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No. 11025

2411

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

CRAWFORD AND DOHERTY FOUNDRY
COMPANY, an Oregon corporation,
Appellee.


Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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PAUL P. O'BRIEN



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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MYER C. SYMONDS, THADDEUS W. VENESS, McDANNELL BROWN and F. E. WAGNER, Bedell Building, Portland, Oregon;

W. DUNLAP CANNON JR.,
1355 Market Street, San Francisco, California,
for Appellant.

BARRETT RANDALL and WILBER HENDERSON, Porter Building, Portland, Oregon,
for Appellee.

In the District Court of the United States
for the District of Oregon

Cir. No. 2124

PRENTISS M. BROWN, Administrator, Office of
Price Administration,

Plaintiff,

vs.

CRAWFORD AND DOHERTY FOUNDRY
COMPANY, an Oregon Corporation,

Defendant.

COMPLAINT

Plaintiff for its first cause against defendant
alleges and respectfully shows the court as follows:

I.

In the judgment of the Administrator, the defendant has engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called "the Act," in that the defendant has violated Revised Price Schedule No. 4—Iron and Steel Scrap, as amended (7 Fed. Reg. 1207), effective in accordance with the provisions of the Act; and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Schedule.

II.

Jurisdiction of this Count is conferred upon this Court by Section 205(c) of the Act.

III.

At all times mentioned herein there has been in effect, pursuant to the Act, Revised Price Schedule No. 4—Iron and Steel Scrap, as amended (7 Fed. Reg. 1207), establishing a maximum price for each of various grades of iron and steel scrap. [1*]

IV.

Since on or about February 21, 1942, defendant has purchased and accepted delivery of iron and steel scrap at prices in excess of the maximum prices therefor established by Revised Price Schedule No. 4.

For its second cause of action against defendant plaintiff alleges and respectfully shows the court:

I.

In the judgment of the Administrator, defendant has engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23), hereinafter called "the Act", in that defendant has violated the General Maximum Price Regulation, as amended (7 Fed. Reg. 3153), and Maximum Price Regulation No. 244—Gray Iron Castings, as amended (7 Fed. Reg. 7871), effective in accordance with the provisions of the Act: and therefore, pursuant to Section 205(a) of the Act, the Administrator brings this action to enforce compliance with said Regulation.

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

Jurisdiction of this Court is conferred upon this Court by Section 205(c) of the Act.

III.

From and including May 11, 1942, until October 26, 1942, there was in effect, pursuant to the Act, General Maximum Price Regulation, as amended (7 Fed. Reg., 3153), establishing the maximum price for various commodities, and specifically gray iron castings, including Meehanite castings, and that the maximum price thereof, established by said General Maximum Price Regulation, is the highest price for which said commodities were sold during the month of March, 1942, by defendant to a purchaser of the same class.

IV.

From and including May 11, 1942, until October 26, 1942, the defendant, doing business in the State of Oregon, sold and delivered Meehanite gray iron castings to Tuerck-Mackenzie Co. and Bingham Pump Co., both of Portland, [2] Oregon, and others, at prices higher than the maximum prices for which defendant sold said commodities to a purchaser of the same class during the month of March, 1942, and therefore at prices higher than the maximum prices therefor established by said Regulation and the amendments thereto.

V.

From and including October 26, 1942, to date of this complaint, there has been in effect, pursuant

to the Act, Maximum Price Regulation No. 244, Gray Iron Castings, as amended (7 Fed. Reg. 7871), establishing maximum prices for the sale of gray iron castings, including Meehanite castings, and that the maximum price for each of such castings as established by said Maximum Price Regulation No. 244 is the highest price for which substantially the same casting was sold by defendant to a purchaser of the same class during the period from August 1, 1941, to February 1, 1942, inclusive.

VI.

From and including October 26, 1942, to the 11th day of March, 1943, the defendant, doing business in the State of Oregon, sold gray iron castings, including Meehanite gray iron castings to the Tuerck-Mackenzie Co., Willamette Iron and Steel Corporation, and the Bingham Pump Co., all of Portland, Oregon, and others, at prices higher than the maximum prices for which defendant sold or offered substantially the same commodities to purchasers of the same class during the period from August 1, 1941, to February 1, 1942, inclusive, and therefore at prices higher than the maximum prices therefor established by said Regulation and the amendments thereto.

For its third cause of action against defendant, plaintiff alleges:

I.

Plaintiff, as the Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant

to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. L. No. 421, 77th Cong., 2nd Sess., 56 Stat. 23) enacted January 30, 1942, and hereinafter called "the Act." [3]

II.

Jurisdiction of this Count is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

III.

Plaintiff incorporated herein by reference as if fully set forth herein the provisions of Paragraphs III, IV, V, and VI of the Count Two.

IV.

Certain of the transactions referred to in Paragraph IV and all of the transactions referred to in Paragraph VI of Count Two occurred more than six months after the date of approval and enactment of the Act. None of said purchases was made for use or consumption other than in the course of trade or business.

V.

Three times the aggregate amount by which the prices received by the defendant in the transactions referred to in Paragraph 4 of this Count exceed the maximum prices provided by the General Maximum Price Regulation, as amended, and Maximum Price Regulation No. 244, as amended, equals \$48,505.62. By Order 12-12-44 V.O.B.

Wherefore, the Administrator prays for a preliminary and final injunction enjoining the defend-

ant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendant from:

(1) Directly or indirectly purchasing, offering to buy, or accepting delivery of any iron and steel scrap at prices in excess of those established by Revised Price Schedule No. 4, as amended (7 Fed. Reg. 1207), or otherwise violating said Schedule or attempting to do anything in violation thereof, or in violation of any Regulation or Order Issued pursuant to the Act establishing maximum prices for iron and steel scrap as heretofore or hereafter amended; and from

(2) Directly or indirectly selling or delivering, or offering to sell or deliver, gray iron castings, including Meehanite castings, at [4] prices higher than the maximum prices established therefor by Maximum Price Regulation No. 244, as amended (7 Fed. Reg. 7871), or otherwise violating said Regulation, or attempting, or agreeing to do anything in violation thereof or in violation of any Regulation or Order issued pursuant to the Act, establishing maximum prices for gray iron castings, including Meehanite castings, as heretofore or hereafter amended.

Judgment on behalf of the United States against the defendant in the sum of \$48,505.62.

By order 12-12-44 V.O.B.

/s/ MEYER C. SYMONDS

/s/ THADDEUS W. VENESS

/s/ McDANNELL BROWN

/s/ F. E. WAGNER

[Endorsed]: Filed July 31, 1943. [5]

[Title of District Court and Cause.]

SECOND AMENDED ANSWER

Defendant, for second amended answer to plaintiff's complaint heretofore authorized by court, admits, denies and alleges:

AS TO FIRST CAUSE OF ACTION

I.

Denies Paragraph I.

II.

Denies Paragraph II.

III.

Admits Paragraph III.

IV.

Denies Paragraph IV.

AS TO SECOND CAUSE OF ACTION

I.

Denies Paragraph I.

II.

Denies Paragraph II.

III.

Admits Paragraph III.

IV.

Denies Paragraph IV.

V.

Admits Paragraph V.

VI.

Denies Paragraph VI. [6]

AS TO THIRD CAUSE OF ACTION

I.

Denies Paragraph I.

II.

Denies Paragraph II.

III.

Defendant, in answer to Paragraph III, pleads to the allegations incorporated therein by reference as defendant admitted or denied the paragraphs referred to.

IV.

Denies Paragraph IV.

V.

Denies Paragraph V.

FIRST AFFIRMATIVE ANSWER

Defendant, for further and separate answer, alleges:

I.

That prior to the 31st day of March, 1942, defendant was operating and conducting its business on the basis of an agreement as to wages with its employees expiring as of March 31, 1942, and all prices for goods, wares and merchandise manufactured and sold by it were based upon the cost of material and labor fixed by agreement subsisting as of that time.

II.

That prior to the 31st day of March, 1942, defendant had been negotiating for a new agreement as to wage rates, which said agreement was not concluded until the 29th day of August, 1942, but which agreement at that time comprehended a scale of wages which became retro-active to the 1st day of April, 1942, or the date of the expiration of the preceding or old wage agreement.

III.

That based on the trend of the negotiations up to that time, defendant knew that the cost of labor subsequent to the 31st day of March, 1942, would be increased, and based on the increased cost of labor and for no other reason whatsoever, the defendant put into effect [7] or promulgated prices of certain commodities manufactured and sold by it; that defendant, in fixing said prices, was forced or compelled to so adjust its prices to avoid the conse-

quences of selling such commodities for prices less than the actual cost of production; that such consequence was due entirely to circumstances beyond the control of the defendant and was based upon facts and circumstances known to plaintiff and his principal, the United States Government, and if any of the items referred to in plaintiff's complaint fall without the technical comprehension of price regulations attempted to be promulgated by the plaintiff, the same were due entirely to facts and circumstances countenanced and approved by plaintiff's principal, the United States Government.

SECOND AFFIRMATIVE ANSWER

I.

That on or about November 10, 1943, immediately following the issuance or promulgation of the new or amended price regulation numbered 244 and dated October 21, 1942 (effective on October 26, 1942,) defendant, through its Secretary-Treasurer, D. B. Card, conferred with the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, in regard to preparing and filing a protest in respect to such price regulations and the interpretation thereof by the Portland office in respect to commodities sold to Willamette Iron and Steel Corporation, Tuerck-Mackenzie Co., and Bingham Pump Co., and others, and at that time the said Chief Enforcement Attorney advised defendant, through said Secretary-Treasurer, that any protest or application for adjustment would be unavailing and ineffective unless accompanied by a tender

of the amounts of money to the Office of Price Administration, which said office at that time claimed were due and owing by the defendant for overcharges on commodities theretofore sold to Tuerck-Mackenzie Co., and Bingham Pump Co., for times subsequent to the original effective date of the maximum price schedule.

II.

That at the time referred to in the preceding paragraph the Office of Price Administration was claiming that defendant had made overcharges to aforesaid Tuerck-Mackenzie Co., and Bingham Pump Co., for commodities sold to said respective firms, and, on the other hand, the defendant was disclaiming that it had charged said companies in excess of the amount fixed by the maximum price schedule and therefore would not pay such amounts; that defendant would have at that time filed a protest against the new price schedule (effective as of Octo- [8] ber 26, 1942) in regard to gray iron castings on the ground that said prices were below the cost of production (taking into account labor and material as of that time), and defendant was prevented or induced not to file such protest because only of the advice or information of the Chief Enforcement Attorney to the effect that such protest would be unavailing, ineffective and would be given no effect by the plaintiff except only if accompanied by the aforesaid amounts which the plaintiff claimed were due and which the defendant disputed.

III.

That defendant, in good faith, accepted aforesaid advice or information from said Chief Enforcement Attorney as and for a ruling of the Office of Price Administration and made no attempt to file a protest or application for adjustment of the prices charged to said companies; that defendant relied entirely upon the representations of said Chief Enforcement Attorney and was induced thereby to act as it did in not filing a protest or application for price adjustment and the plaintiff should be and is estopped from making any claim against the defendant on account of alleged violations of regulations as to maximum prices subsequent to the date of said advice, to-wit: On or about the 10th day of November, 1942.

IV.

That if it should be found that defendant charged in excess of the prices fixed by regulation 244, said were within the amounts fixed in the protest defendant would have filed had it not been for the advice of the Chief Enforcement Attorney **aforesaid, and** as fixed in the protest defendant subsequently did file, to-wit: On the 10th day of February, 1943.

V.

That the regulations of the Office of Price Administration upon which the second and third cause of action of plaintiff's complaint is based provides, among other things, as follows:

“Any person may offer or agree to adjust or fix prices to or at prices not in excess of the

maximum prices in effect at the time of delivery. Where a petition or application for amendment or for adjustment or for exception under Sec. 1421-157 has been duly filed, a seller may make sales, deliveries or offers of sale at prices adjustable in accordance with the disposition of such petition or application and shall refund to the purchaser any moneys or other consideration paid which are in excess of the maximum price." [9]

That the aforesaid regulation was of the same force and effect as the part of regulation number 244 relating to maximum prices.

THIRD AFFIRMATIVE ANSWER

I.

Defendant alleges that the individuals subscribing their names as attorneys for plaintiff in this action instituted said action of their own volition or at the instance of the Portland, Oregon, office of the Office of Price Administration and without the named plaintiff theretofore having directed the institution of said action in his behalf and without said plaintiff having delegated to said attorneys or the Portland, Oregon, office of the Office of Price Administration authority to institute such action, and this action was instituted and is being prosecuted without authority of the plaintiff.

FOURTH AFFIRMATIVE ANSWER

I.

That sales made by the defendant subsequent to the effective date of the maximum price regulation No. 244 to the purchasers, referred to in Paragraph VI (Second Cause of Action), namely: Tuerck-Mackenzie Co., Willamette Iron & Steel Corporations and Bingham Pump Company, were effected through an agreement with such purchasers that the commodities represented in each sale would be invoiced to such purchasers at prices which defendant claimed it was entitled to charge under said regulation 244; however, it was understood and agreed between the defendant and such purchasers that such purchasers would retain and not pay to the defendant that amount of each invoice aggregating the excess over the price which plaintiff claimed, and does now claim, was applicable to the commodities represented by such invoice, pending the final determination by plaintiff and defendant of the price applicable, and said excess has not as yet been collected by the defendant or paid to the defendant by said respective purchasers, and defendant's action in fixing said price was not a wilful violation of or disregard of said price regulation, nor was said price the result of defendant's failure to take practicable precautions against a violation. [10]

FIFTH AFFIRMATIVE ANSWER

I.

That all castings manufactured by defendant were for sale to purchasers located in the same area

and were in substantially the same quantities and of the same grades, and the conditions of the sale were the same; that they were of the same general design, specifications and weight and produced by the same type of pattern equipment, and therefore said purchasers belong to the same general class; that after the promulgation of the general maximum price regulation, defendant, acting in good faith, was attempting to determine the applicability of the maximum prices fixed by said regulation as the same related to the various purchasers of the defendant during the time upon which the price schedule was based; that during said period defendant's officers conferred with representatives of the Portland office of the Office of Price Administration for the purpose of informing themselves as to the applicability of said price; that all prices fixed for castings sold as referred to in plaintiff's complaint were fixed by defendant's officers in good faith and with full intention of complying with all the maximum price regulations and in the belief that the prices so fixed did so comply, and defendant now believes that all prices to all purchasers referred to in plaintiff's complaint were within such regulations.

Wherefore, defendant, having answered plaintiff's complaint, prays that plaintiff's complaint be dismissed and for such other relief as the court may deem proper.

/s/ BARRETT RANDALL

/s/ WILBER HENDERSON

Attorneys for Defendant.

Due and timely service of the foregoing, and the receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 27th day of September, 1944.

/s/ F. E. WAGNER,

Of Attorneys for Plaintiff.

[Endorsed]: Filed September 27, 1944. [11]

[Title of District Court and Cause.]

MOTION

Comes the plaintiff in the above entitled action and moves the Court for an order striking from defendants' Second Amended Answer all of the allegations contained in defendant's FIRST, SECOND, THIRD, FOURTH and FIFTH affirmative answers and defenses.

F. E. WAGNER,

Of Attorneys for Plaintiff.

State of Oregon,

County of Multnomah—ss.

Due Service of the foregoing Motion is hereby accepted in Multnomah County, Oregon this 4th day of December, 1944.

/s/ WILBER HENDERSON,

Of Attorneys for Defendants.

[Endorsed]: Filed December 4, 1944. [12]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

This matter came on to be heard upon the application of Chester Bowles, acting by and through his counsel, for an order substituting said Chester Bowles as plaintiff in the above-entitled cause in place and in lieu of Prentiss M. Brown, and the Court being fully advised in the premises, it is

Hereby Ordered that Chester Bowles be and he is hereby substituted as plaintiff in the above-entitled cause in the place and in lieu of Prentiss M. Brown.

Dated this 20th day of December, 1943.

/s/ CLAUDE McCOLLOCH,

United States District Judge.

Approved December 13, 1943,

WIDBER HENDERSON,

Of Attorneys for Defendant.

December 12, 1944.

[Endorsed]: Filed December 20, 1943. [13]

[Title of District Court and Cause.]

ORDER

December 12, 1944

Plaintiff appearing by Mr. F. E. Wagner and Mr. Adams F. Joy, of counsel, defendant by Mr. Wilbur Henderson and Mr. Barrett Randall, of counsel. Whereupon this cause comes on to be tried before

the Court upon the pleadings and the proofs without the intervention of a jury, and the Court having heard the evidence adduced,

It is ordered that plaintiff's motion to amend its complaint herein be, and the same is hereby allowed, and that the bill of particulars on file herein be, and the same is hereby amended by interlineation.

Thereafter this cause comes on to be heard by the Court upon the motion of the defendant for an order of dismissal herein, and the Court having heard the statements of counsel, will advise thereof. Whereupon,

It is further ordered that the first cause of action herein be and the same is hereby dismissed. [14]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on for trial on the 12th day of December, 1944, before the Honorable Claude McColloch, Judge of the above entitled Court, plaintiff appearing by F. E. Wagner, of his attorneys and defendant appearing by Wilber Henderson and Barrett Randall, of its attorneys, and witnesses having been sworn and testified and evidence having been adduced, all submitted to the Court without a jury, the Court now makes the following

FINDINGS OF FACT

I.

During all times mentioned in plaintiff's complaint, defendant was and still is a corporation existing and by virtue of the laws of the State of Oregon, and said corporation having its principal office and place of business in the City of Portland, County of Multnomah, and State of Oregon.

II.

During said times plaintiff's predecessor was and plaintiff was and now is the duly appointed, qualified and acting Price Administrator of the Office of Price Administration of the United States of America.

III.

Defendant was now is a foundry company engaged in the business of founding and selling gray iron castings.

IV.

That during the period August 1, 1942 to October 26, 1942, plaintiff's sales of castings were governed by the General Maximum Price Regulation, said [15] regulation having theretofore been promulgated pursuant to the provisions of the Emergency Price Control Act of 1942. During said period defendant sold and delivered gray iron castings to the Tuerck-MacKenzie Company, Bingham Pump Company, Williamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company, all of Portland, Oregon.

V.

Defendant's maximum prices for said sales pursuant to the provisions of the General Maximum Price Regulation were the highest prices charged for the same or similar casting sold and delivered during the month of March, 1942 to a purchaser of the same class.

VI.

The court finds that defendant sold similar castings to the Marine Electric Company of Portland, Oregon, during the month of March 1942, that the said Marine Electric Company was a purchaser and of the same class as the Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company, and that the prices charged said Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation during the period August 1, 1942, to October 26, 1942, did not exceed the highest prices charged to the said Marine Electric Company during the month of March, 1942.

VII.

That during the period of time October 26, 1942, to and including March 10, 1943, sales and deliveries of said gray iron castings by said defendant corporation to said purchasers were governed by the provisions of Maximum Price Regulation 244. By virtue of the provisions of said Maximum Price Regulation 244, defendant was entitled to charge and receive for each casting the highest net price

at which it delivered substantially the same casting to the particular purchaser during the period August 1, 1941, to February 1, 1942.

VIII.

The court finds that on or about the 13th day of April, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Pump Company to prices above those theretofore charged said respective purchasers [16] for similar castings; that in the early part of November 1942 defendant entered into an arrangement with the aforesaid respective purchasers to render invoices for castings delivered to them after that time upon the basis of the increased price schedule, but that notwithstanding such invoices it was understood that such purchasers would pay only upon such invoices the amount determined by computation on the original or unrevised price schedule, or on the basis of the prices prevailing before the increase, and that the excess or difference between the amount shown by the invoice and the amount paid would be retained by such purchaser pending the determination of the validity of the increased price schedule; that since the early part of November 1942 the defendant has continued, during the time referred to in plaintiff's complaint, to render to the aforesaid purchaser invoices and to make deliveries and receive payment in pursuance of the foregoing agreement.

IX.

That upon the sales and deliveries of castings by defendant to Tuerck-MacKenzie during the period from October 26, 1942, to March 10, 1943, the amount of the prices at which castings were invoiced over the prices fixed by Maximum Price Regulation 244 amounted to \$1,784.06; that said purchaser withholds in its possession, on account of the arrangement aforesaid, the amount of such excess.

X.

That upon the sales and deliveries of castings by defendant to Bingham Pump Company during the period from October 26, 1942, to March 10, 1943, the amount of the prices at which the castings were invoiced over the prices fixed by the Maximum Price Regulation 244 amounted to \$3,269.38; that said purchaser withholds in its possession, on account of the arrangement aforesaid, the amount of such excess.

XI.

The court finds that on or about the 20th day of October, 1942, the defendant increased its price schedule to Willamette Iron & Steel Corporation to prices above those theretofore charged said purchaser for similar castings, such revision to be retroactive and apply to all sales made to said purchaser [17] subsequent to March 1, 1942; that in the early part of November 1942 defendant entered into an agreement with the aforesaid purchaser to render invoices for castings delivered to it after that time upon the basis of the increased

price schedule, but that notwithstanding such invoices it was understood that such purchasers would pay only upon such invoices the amount determined by computation on the original or unrevised price schedule, or on the basis of the prices prevailing before the increase, and that the excess or difference between the amount shown by the invoice and the amount paid would be retained by the purchaser pending the determination of the validity of the increased price schedule; that since the early part of November 1942 the defendant continued, during the time referred to in plaintiff's complaint, to render to the aforesaid purchaser invoices and to make deliveries and receive payment in pursuance of the foregoing agreement.

XII.

That upon the sales and deliveries of castings by defendant to Willamette Iron & Steel Corporation during the period from October 26, 1942, to March 10, 1943, the amount of the prices at which castings were invoiced over the prices fixed by Maximum Price Regulation 244 amounted to \$3,646.20; that said purchaser withholds in its possession, on account of the arrangement aforesaid, the amount of such excess.

XIII.

The court finds that during the period October 26, 1942, to December 31, 1942, the defendant corporation sold and delivered gray iron castings to the Iron Fireman Manufacturing Company of Portland, Oregon; that the legal maximum prices for

gray iron castings governing said sales were established by said Maximum Price Regulation 244. The court further finds that all sales of said castings were at prices not in excess of the maximum price as established by said regulation for the same castings as sold and delivered during said time to Marine Electric Company of Portland, Oregon.

XIV.

The court finds that defendant corporation sold similar castings to the Marine Electric Company of Portland, Oregon, during the period August 1, 1941, [18] to February 1, 1942; that said Marine Electric Company was a purchaser and of the same class as the Iron Fireman Manufacturing Company, and that in sales of gray iron castings by defendant to the said Iron Fireman Manufacturing Company during the period October 26, 1942, to December 31, 1942, said prices charged did not exceed the prices charged by defendant to Marine Electric Company during said period August 1, 1941, to February 1, 1942.

XV.

The court further finds that during all said times the violations of the above-mentioned price regulation, order or price schedules by said defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violations.

XVI.

The bringing of this action was not authorized by the named plaintiff nor his predecessor, except by the purported blanket delegation of authority, in Futuru, Rev. Gen. Order 3 in evidence, but was brought on the exercise of discretion by the then Chief Enforcement Attorney of the Regional Office in the City of San Francisco, State of California, of the Office of Price Administration, and pursuant to his express direction.

Based upon the foregoing FINDINGS OF FACT, the court makes the following

CONCLUSION OF LAW

I.

That defendant is entitled to a judgment that this action be dismissed.

Dated this 21st day of December, 1944.

CLAUDE McCOLLOCH,

United States District Judge.

Service of foregoing accepted in Portland, Oregon, this 19th day of December, 1944.

F. E. WAGNER,

Of Attorney for Plaintiff.

[Endorsed]: Filed Dec. 21, 1944. [19]

In the District Court of the United States
for the District of Oregon

Civil No. 2124

CHESTER BOWLES, Administrator,
Office of Price Administration,
Plaintiff,

vs.

CRAWFORD AND DOHERTY FOUNDRY
COMPANY, an Oregon corporation,
Defendant.

ORDER OF DISMISSAL

This matter came on to be tried on the 12th day of December, 1944, before the Honorable Claude McColloch, Judge of the above entitled Court, plaintiff appearing by F. E. Wagner, of his attorneys and defendant appearing by Wilber Henderson and Barrett Randall, its attorneys, and witnesses having been sworn and testimony and evidence adduced, and the Court having heretofore made its Findings of Fact and Conclusions of Law.

Now Therefore, it is

Ordered and Adjudged that this action be and the same is hereby dismissed.

Costs to neither party.

Dated this 21st day of December, 1944.

CLAUDE MCCOLLOCH

United States District Judge.

[Endorsed]: Filed Dec. 21, 1944. [20]

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

It appearing necessary that the original exhibits in the above-described cause, accompany the transcript of record upon appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits numbered 1 to 35, inclusive, filed in this cause.

Dated at Portland, Oregon This 20th day of March, 1945.

CLAUDE McCOLLOCH

Judge

[Endorsed]: March 20, 1945. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Crawford and Doherty Foundry Company, an Oregon Corporation, defendant above named, and Barrett D. Randall and Wilber Henderson, its attorneys.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment dismissing said action, made and

entered in the above entitled action on the 21st day of December 1944.

Dated at Portland, Oregon this 24th day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, Jr.

Attorneys for Appellant

Chester Bowles,

Administrator

[Endorsed]: Filed Feb. 24, 1945. [22]

[Title of District Court and Cause.)

DESIGNATION OF RECORD

Comes now the plaintiff above named, and as appellant in the above-entitled cause submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Complaint
2. Second Amended Answer
3. Plaintiff's Motion to Strike from Defendant's Second Amended Answer, paragraphs I, II, III, IV and V.
4. Order of Substitution of Party Plaintiff
5. Order dismissing First Cause of Action
6. Findings of Fact and Conclusions of Law
7. Judgment Order Dismissing Action
8. Transcript of Pre-trial Conference, December 4, 1944.

9. Transcript of Trial Proceedings, December 12, 13 and 20, 1944.
10. Order to forward all exhibits including Plaintiff's and Defendant's exhibits introduced in evidence, Nos. 1 to 35 inclusive.
11. Notice of Appeal.
12. This Designation of Record.

Dated at Portland, Oregon this 19th day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Appellant

[23]

State of Oregon

County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted in Multnomah County, Oregon, this 20th day of March, 1945, by receiving a copy thereof duly certified to as such by F. E. Wagner, of Attorneys for Plaintiff.

/s/ WILBER HENDERSON

Of Attorneys for Defendant.

[Endorsed]: Filed March 20, 1945. [24]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss:

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon,

do hereby certify that the foregoing pages number 1 to 25 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 2124, in which Chester Bowles, Administrator, Office of Price Administration, is Plaintiff and Appellant, and Crawford and Doherty Foundry Company, and Oregon Corporation, is Defendant and Appellee; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof, and that it is a full, true and correct transcript of the record and proceedings had in said court and in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken and filed in this office in this cause, together with exhibits 1 to 35 inclusive.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 29th day of March, 1945.

(Seal)

LOWELL MUNDORFF,

Clerk.

By F. L. BUCK

Chief Deputy. [25]

In the District Court of the United States
for the District of Oregon.

Civil No. 2124.

CHESTER BOWLES, Administrator,
Office of Price Administration,
Plaintiff,
vs.

CRAWFORD AND DOHERTY FOUNDRY
COMPANY, an Oregon corporation,
Defendant.

Portland, Oregon, Monday, December 4, 1944.
10:15 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Frank E. Wagner, District Enforcement
Attorney, Portland District, Office of Price
Administratiton, appearing in behalf of the
Plaintiff.

Mr. Wilber Henderson, of Attorneys for the
Defendant.

Alva W. Person, Court Reporter.

PRE-TRIAL PROCEEDINGS

Mr. Henderson: If it please the Court, counsel
for the Administrator informed me before coming
into court they were [1*] filing a motion directed

*Page numbering appearing at top of page of original Reporter's Transcript.

to the answers that had been filed. Probably that should be disposed of first, or should it? We will proceed as your Honor wishes.

The Court: What is the motion about?

Mr. Wagner: It is a repetition, your Honor, of a previous motion that was filed to the original pleading. This is renewing our position to the defenses that are raised in the second amended answer of the defendant.

The Court: I may reserve decision on those,—will either decide them at pre-trial or trial.

Mr. Henderson: If the Court please, at some time when we were before you, I believe your Honor suggested that I might proceed with the trial of this case immediately, without a pre-trial conference, and I stated that I thought a pre-trial conference was necessary, and so I suppose the first thing to do is to justify to the Court that assertion.

There are a lot of causes of suit stated in the complaint. The first had to do with some sale of some scrap iron, which I understood is a matter that the Government is no longer urging. We are concerned only with the second and third causes of suit.

The second cause of suit states that between the 11th day of May, 1942, and the 26th day of October, Crawford and Doherty sold certain gray iron castings, including Meehanite castings, for prices in excess of the Maximum Price fixed as [2] of March, 1942, to Tuerck-MacKenzie, and Bingham Pump Company, and they also in this same cause of suit

allege that between October 26, 1942, and March 11, 1943, they sold to Tuerck-MacKenzie, Willamette Iron & Steel Corporation, Bingham Pump Company, and others, these castings in excess of price fixed by Maximum Price Regulation 244, which was the highest price between October 1st, 1941, and February 1st, 1942.

The third cause of action makes all of these matters part of the same cause of suit and asks for, or alleges that treble amount would equal \$48,477.90.

Now the first answer is directed to the proposition that the prices upon which—I mean, the price schedule was based on prices as between February 1st, 1942, and August 1st, 1941—I have stated these dates backwards—that the wage schedule of Crawford and Doherty, which it then had as foundry workers, expired the 1st day of March and the War Labor Board issued a directive increasing the wages of Crawford and Doherty from 20 to 30 per cent over the amount that was being paid when the price which is used as the basis was fixed. That is, although the Government said that the prices should be as of prior to the 1st day of February, 1942, the War Labor Board said the same labor produced these same castings should be increased from 20 to 30 per cent.

Now, if the Court please, that was the issue in the case before the Emergency Court of Appeals. That has been [3] decided adversely to Crawford and Doherty. I am telling the Court. I am con-

ceding that the Court was right, but they have decided it, and so that is out.

Now the second affirmative answer advances the proposition that during the time immediately subsequent to the 26th day of October, which is the date Regulation 244 went into effect, the office of Crawford and Doherty was in conference with the local enforcement officers and the local enforcement officers told them that they could not file a protest unless they put up all that they claimed was then due.

Now the regulation provided that if this protest was filed they could go ahead and proceed to and did sell at the prices they claimed they were entitled to.

We claim thereafter, and especially against the Government—not against the Government; against the Administrator, because the Enforcement Attorney told us that it would be of no avail to file this protest, because it would be disregarded, because those amounts were due, so it was not filed until a subsequent date. We allege that if it had not been for the action of the local office that would have been done.

Now the third affirmative defense is directed to the proposition that the individuals who subscribed their names as attorneys for the plaintiff and who instituted [4] this action, did so of their own knowledge, and it is not an action by the Administrator himself. This is in line with the motion that was made in the Wheeler case, which was heard by

your Honor, and it is intended to raise the same point.

Now the fourth affirmative answer is to the effect that during part of this period of time for which they are asking this money Crawford and Doherty has not collected the money. Crawford and Doherty has only collected the price that the Government said they were entitled to collect, and Willamette Iron & Steel, Tuerck-MacKenzie, and Bingham Pump Company are withholding the surplus amount. That is, although invoices were rendered at the price that Crawford and Doherty claimed, there was an understanding with these people, these customers, Tuerck-MacKenzie, Bingham Pump Company, Willamette Iron & Steel and Iron Fireman, that they would only pay the amount that the Government said was the proper price. So for all that amount it is our contention that, of course, there is not a violation of the regulation.

Now a fifth defense, and, if the Court please, this is the one that provokes what I consider made it necessary that a pre-trial conference be had. It is our contention that all of the prices for these people, Tuerck-MacKenzie, Bingham Pump Company, Willamette Iron & Steel, and the Iron Fireman, are at prices that were the same as Crawford and [5] Doherty were during the month of February, even—I don't go as far as March—even back as far as February, 1942, the same prices that Crawford & Doherty were at that time charging to Marine Electric.

So I considered it was necessary to have a pre-trial conference to determine the formula, if there is such a thing—the formula or the method we are to resort to, to determine whether or not these castings that were sold the Marine Electric are, in fact, the same as the castings sold these other people. That is, do they have to be identical in shape, do they have to be identical in weight, to be the same casting or the casting that is contemplated by the regulation, or may Crawford and Doherty rightfully charge for these castings, if they are the same in a general way—may they charge the same price that they charged the Marine Electric?

Now it is our contention that they are, and I was hoping that out of the pre-trial conference we could obtain—incidentally, counsel for the Government and we have conferred several times trying to agree upon a stipulation, stipulating a formula. We could not ultimately agree. We are hoping that out of this pre-trial conference that one thing can be determined, or we want that determined, so when we go to trial we will know what is expected of us in the way of evidence on that particular thing.

The Court: If you haven't been able to agree, what can I [6] do about the matter?

Mr. Henderson: Well, your Honor, I suppose that you are in a position where you have to do something.

The Court: I wouldn't except after trial. I think I can guess what your disagreement is about, and I don't see how to describe it at all, which would reflect the complete theories of the parties.

Mr. Henderson: Well, to illustrate what I mean I said you have to; I suppose that is true—we have to finally leave it to the evidence, but we had suggested to counsel for the Government——

The Court: Everybody knows you can go down here and get your automobile repaired now and you pay \$75 for what you paid \$25 two years ago, and yet if somebody were to claim that, not naming anybody but whoever was doing this work, that they could not charge more than \$25 because on a previous date that is what he charged, he would show you a couple of types of red paint and a few other things that made it different than what he did before. That is just human nature in those things. I suspect something like that presents the difference between you people, as to whether in fact these things were the same as you made for the Marine Electric or the same as you made for other people.

Mr. Henderson: Now to further indicate to your Honor what we had in mind, this is an outline of what we proposed to the [7] Government. That is, are these the things that are to be taken into consideration: Whether the iron castings purchased are comparable shapes, sizes, weights and dimensions? Whether they were manufactured according to pattern furnished by respective parties to manufacturing and grading to common standards——

The Court: What are they?

Mr. Henderson: To common standards. That is, manufactured according to pattern, or really manufactured to keep in stock to supply a particular

demand. That is what I meant by that. Whether or not the patterns were suitable for bench or floor molding, on the one hand, or machine molds, on the other. That is, having to do with the manner in which they were manufactured in the foundry. Whether or not the castings were manufactured on a job basis or on a production basis. Whether or not the use of the castings, that is, whether it was for the installation into or attachment to an instrumentality, device or contrivance for resale or for use by the purchaser in his plan operation, or for resale as a distinct item as manufactured. We are contending all of these things were actually produced for the Marine Electric, and all of them to go into ships or munitions of war by the various parties, by the Marine Electric, the Bingham Pump Company, the Willamette Iron & Steel and the Iron Fireman. Whether or not the castings required——

The Court: You claim that as a ground of similarity? [8]

Mr. Henderson: Yes. I am suggesting that all of these castings had these things in common, if that is what is determined.

The Court: Yes.

Mr. Henderson: That is, I am now suggesting to your Honor what all these castings manufactured by Crawford and Doherty in these various instances have in common.

The Court: Yes.

Mr. Henderson: And it is our contention that these common attributes or characteristics make

them fall within the classification fixed by the price regulation.

The Court: Mr. Wagner gets up and will probably tell me wherein they were different, I suspect.

Mr. Henderson: Yes. I apprehend that will be his position, but these are the things that we are suggesting should be taken into consideration. Next, whether the finishing or processing required by the purchaser of the item purchased; that is, did Crawford and Doherty finish it or did the purchaser finish it?

Similarity of process, manner of delivery, location of purchaser in respect to plant, credit arrangement, and so forth.

Similarity of type of iron used.

Now you can get the idea that they somewhere or other should be determined in the pre-trial conference, if it is possible. [9]

The Court: Now Mr. Wagner.

Mr. Wagner: Now, if the Court please the situation that we are at issue upon, which Mr. Henderson has been discussing here, to me is just only a fact, and it emanates from the provision of the regulation, Regulation 244, also General Maximum Regulation, which is involved here, which requires——

The Court: And your number of the General Maximum Price Regulation?

Mr. Wagner: Oh, the General Maximum Price Regulation is effective May 11th, 1942. I don't have the Federal Register No. of them, but Maximum Price Regulation 244 was effective October

26th, 1942. Its Federal Register No. is Vol. 7, Page 971. And then there are a number of amendments that follow there. But the provisions of both of the regulations that have to do with this particular question concern the purchaser of the same class. As I understand Mr. Henderson's position, he is asserting that the Crawford and Doherty's customers, all of their prices are to be governed by those which were charged during the various freezing periods by Crawford and Doherty to the Marine Electric Company. Our position is that on the four customers that were involved in this particular action, namely, Tuerck-MacKenzie Company, and Bingham Pump Company, and Willamette Iron & Steel Corporation, and the Iron Fireman Manufacturing Company, that the first two stated purchasers of the same class, that the [10] other two also are purchasers of the same class but still a different class.

Now just what is a purchaser, or what are the items or facts that go to make up or determine whether or not a purchaser falls into one class or another, seems to me involves a number of other things than just looking to the particular casting or to the fact that the same or similar metal might be used in a casting. I think any classification of a purchaser that we have to look to their dollar volumes, any discounts that might be granted, credit items, and the average poundage that is sold to the particular purchaser.

I think, as does Mr. Henderson, that the size

and the shape of the casting has something to do with it. There is a matter that seems to me very important. That is the location of the purchaser. That is, whether he is—whether deliveries can readily be made, whether he is accessible to the facilities of a seller. Then of course to me the most important thing to determine whether or not a purchaser falls within the same class is the price that was charged. I think that is probably the most important item to consider.

Now, as I say, I don't agree with Mr. Henderson's idea of the formula or the rule which he seeks to establish, but I do feel that the whole question is one of fact and Mr. Henderson has, of course, the privilege of putting on any testimony, any evidence in support of his contention, [11] and of course we have that privilege, too, and it is then up to the Court to determine, as a matter of fact, whether or not the prices are to be governed by those charged to the Marine Electric Company, or to be governed by the previous charges to these same purchasers here.

The Court: Well, how is your case going to shape up? You will have the opening. How will you shape your case up?

Mr. Wagner: Well, we are basing our prices on all of the transactions that Crawford and Doherty Company had during their business periods with these particular purchasers, with each one, with each purchaser itself. For example, during March of 1942 Crawford and Doherty Company charged Tuerck-MacKenzie Company certain prices for cer-

tain castings, and we have a record of those charges on a per-pound basis. Then May 11th, 1942, the General Maximum Price Regulation was issued, which froze prices as of March of that year. In June, or April, April 13th, Crawford and Doherty Company issued a statement in writing to purchasers, indicating that effective April 14th their prices would be a certain amount higher. On August 1st, which was the first date upon which this type of action could be prosecuted under the Price Control Act Crawford and Doherty were still making those increased charges.

Thereafter, and in October, 1942, the Price Regula- [12] tion 244 was issued, which was constructed to roll prices back to a period in 1941, between August 1st, 1941, and February 1st of 1942, where the seller could establish his ceiling prices by taking the highest sale that he made to a purchaser of the same class, and that is the basis of our suit. That is, part of it is based upon transactions covered by the General Maximum Price Regulation, then the remainder being covered by the Price Regulation 244.

Now we have all of the records that are necessary to establish those base period charges. We also have records that are necessary to indicate the volume of business at the increased prices that Crawford and Doherty had done in each case.

Now I don't know whether there is any disagreement as to the bill of particulars, or what the bill of particulars sets forth here. If there is we would

like at this time to introduce our exhibits are pre-trial exhibits.

The Court: Well, Gentlemen, there is lots about this case that I don't understand at this stage, and may never understand, and I would like to make sure that each of you before you go out understand the opposition's theory. You understand how he is going to open on you?

Mr. Henderson: Yes, your Honor.

The Court: What he bases his claim on?

Mr. Henderson: That is one of the things that I would [13] like to know. Is he going to close his proposition on the assumption that, we will say, the price which controls is the price of a particular seller, or is he going to have to meet the issue that we don't sell to anyone else at another price? That is, what is his position? Is the Government's position this: That if you sold to Tuerck-MacKenzie, we will say, a box that is oblong in shape, that would not be a sample or could not be used or availed of by us if we sold to the Willamette Iron & Steel a box that was square in shape, yet making up the same amount or taking up the same amount of metal from the same material, sold on the same price plan and delivered within the same area?

Now if the Government means that, that they have to be the exact item, I would like to know, and I would like to know if we are expected to take the burden of showing that at that time we sold to somebody else at a different price, or must they initially show that our price schedule for

these particular things, to whomsoever we sold, was changed?

Do I make myself clear there? That is, is he claiming that all he has to establish is that we changed the prices of the particular company, or is he going to take the burden, or is the Government going to take the burden of showing that as to any of these people they sold to the prices were greater than the prices had been for the Marine Electric? [14]

Mr. Wagner: Well, our position, Mr Henderson, is that the Marine Electric Company prices during March of 1943, or during the other freezing period, August of 1941 to February 1st of 1942, does not govern the prices for the four purchasers that are involved and set forth in the complaint. That is, the Marine Electric in our position is a very small purchaser. They are purchasing items that are not at all comparable to the castings that are involved here, and, therefore, those prices cannot govern the prices for castings which were sold to Tuerek-MacKenzie, or Bingham Pump, nor can those prices govern the castings which Crawford and Doherty sold to Willamette Iron & Steel and the Iron Fireman Company. Those are entirely different types of castings, and they are entirely different types of purchasers. That is our position. It would seem to me that if you wish to decide that the Marine Electric Company—that their freezing date prices are the governing ones, you certainly have that privilege, but then it comes down to this question of fact we are discussing: As to what is the customs of the same class,

whether or not these prices govern or whether these particular prices govern that were taken from the previous records of Crawford and Doherty to the same buyers.

The Court: To the same buyers?

Mr. Wagner: Yes, with the exception of Iron Fireman Manufacturing Company. They had no purchases during the freeze [15] periods, but we contend that the prices at which Willamette Iron & Steel Corporation were sold castings governs there, because of the identical size, and especially of a casting which was for Liberty Ship motors.

The Court: I don't know how your pleadings are going to break down, but let me ask, now, you are claiming an overcharge in sales to Tuerck-MacKenzie? That is one of your claims, isn't it?

Mr. Wagner: Yes.

The Court: Now then, to prove that charge are you going to show an earlier sale during the freeze period to Tuerck-MacKenzie at a lesser amount? Is that the way your case is going in?

Mr. Wagner: Well, we are going to start——

The Court: You are going to put Tuerck-MacKenzie against Tuerck-MacKenzie, and Willamette against Willamette? Is that the way you expect to do?

Mr. Wagner: No. We are putting Tuerck-MacKenzie against—their freeze period prices against Tuerck-MacKenzie's subsequently raised prices.

The Court: All right. And Willamette against Willamette?

Mr. Wagner: That is right; and Bingham Pump against Bingham Pump.

The Court: And that is the way it is going to be as to everyone? [16]

Mr. Wagner: Yes.

The Court: And in that case you are going to claim sales against Willamette?

Mr. Wagner: Yes, that is right.

The Court: How does that please you?

Mr. Henderson: Well, your Honor, it finally gets to this: The law says, or the regulation says, "The highest price charged by the seller during such month for the same commodity or service." What I am trying to find out from the counsel, is he distinguishing the service entirely by the fact that it was sold to that particular person? That is, I can give a fair illustration: Supposing that Tuerck- MacKenzie had bought an oblong box and the same amount of material, the same kind of material went into one that was square to one of these other people, yet they had different prices at different times, which one can we avail ourselves of? This says, "The highest price charged by the seller during such month for the same commodity or service." That is the General Maximum Price Regulation. Then 244 says: "Castings substantially the same as those which the seller sold or offered for sale at any time during the period and from August 1st, 1941, to February 1, 1942." It does not say anything about, sold to the same person; it says castings substantially the same. What I had hoped to determine is, what is the Court going to require

them to do to prove that, to negative the [17] idea that we didn't sell to someone else at a similar price.

The Court: I am not going to require them to do anything until it comes to deciding the case. I am just going to sit here and hear both sides. Can you help him out in understanding your theory better than he has?

Mr. Henderson: Let me clear up one thing, as far as invoices. As far as that bill of particulars is concerned we will admit that that is a correct statement of the items as reflected by the books of Crawford and Doherty, if that is what you mean.

Mr. Wagner: Well, I assume, then, that that would dispense with, or dispose of, a lot of documentary transcriptions that we have.

The Court: It sounds like it. How about that? Can you help him?

Mr. Wagner: There are some other things we would like to introduce, if the Court would like to have the exhibits go in. Now or at the time of trial is immaterial to us.

The Court: It won't matter, except I want him to be sure to know what you are going to put in. Do you have something there he doesn't know about? You have been talking about stipulations there. Do you have some you haven't told him about before?

Mr. Wagner: No, I have nothing further. I am sure we have discussed everything from time to time [18]

The Court: Did you hear his last question?

Mr. Wagner: I didn't understand it.

The Court: What?

Mr. Wagner: I didn't understand him. I would like to have him repeat that again, if I can help him.

The Court: Well, you read it, Mr. Person.

(The Reporter thereupon read the statement by Mr. Henderson, beginning, "Well then, it finally gets to this," and concluding, "to someone else at a similar price.")

The Court: That is far enough. The point of regulation says one place the same commodity and at another place it says "substantially the same commodity."

Mr. Wagner: Yes.

The Court: I can't see why he has to be confined to a sale to the same person—why he can't show a sale of the same or substantially the same commodity to another person, at or during the price freezing period.

Mr. Wagner: Well, the during the period of regulation that we believe involved here, it reads as follows:

"The maximum price for each such casting shall be the highest net price (after adjustment for all applicable customary charges, discounts, quantity differential and other allowances in effect for the seller between August 1st, 1941, and February 1st, 1942, inclusive) at which the seller sold [19] or offered for sale such casting to a purchaser of the same class during the period August 1st, 1941, to February 1st, 1942, inclusive."

Now the class of purchaser is involved.

The Court: You say Marine Electric is not of the same class?

Mr. Wagner: That is right, just as much as substantially the same castings.

Mr. Henderson: He didn't answer the question. Is he going to assume that burden at the trial and negative the idea this same casting was not sold to someone else at a different price? That is, how can he complete his case without negating the idea it was sold to somebody else at a higher price? I am trying to find out the way in which we can meet this question.

Mr. Wagner: I believe that our evidence will disclose that these four purchasers are the primary purchasers or customers of Crawford and Doherty Foundry Company, or were during the period of time; that as to those particular classes of purchasers their prices would be governed accordingly by the base period charges, their previous charges. Now whether or not that would seem to negative or exclude Marine Electric, or whether or not you wish to insert or assert that Marine Electric prices would control is just a matter of procedure—a matter of affirmative definition, I suppose, or general [20] denial.

The Court: All right, Gentlemen. When shall be try the case? the sooner the better.

Mr. Henderson: Is the Government going to file a reply?

Mr. Wagner: No. I think our motion to strike will suffice.

The Court: When do we try the case ?

Mr. Wagner: We are ready at any time, your Honor.

The Court: Mr. Henderson?

Mr. Henderson: If the Court please, until I am apprised about it I don't know. It is hard to come into Court. It is hard to find out. This last answer has not answered any question.

The Court: I guess I will have to set the trial date.

Mr. Henderson: Well, I am agreeable to practically any time. I think I have a case set for the 15th of December.

The Court: Well, we will try this case in one day, or less, won't we?

Mr. Henderson: I don't know.

The Court: Let's try to try it on—you have a case here, or your office does, on Monday. Let's try to try it on Tuesday, the 12th.

Mr. Wagner: The 12th?

The Court: All right.

(Thereupon the pre-trial procedure was concluded.) [21]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, certify that the pre-trial procedure in the case of Chester Bowles, Administrator, Office of Price Administration, plaintiff, vs. Crawford and Doherty Foundry Company, an Ore-

gon corporation, defendant, Civil No. 2124, was held on Monday, December 4, 1944, before the Honorable Claude McColloch, Judge; that I reported all of said procedure, and the foregoing twenty-one pages, numbered 1 to 21, both inclusive, contain a full, true and impartial record of said proceedings.

Dated at Portland, Oregon, this 10th day of March, A. D. 1945.

ALVA W. PERSON

Court Reporter

[Endorsed]: Filed March 17, 1945.

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, December 12, 1944.

10:00 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Franz E. Wagner, District Enforcement Attorney, Portland District, Office of Price Administration, appearing in behalf of the Plaintiff.

Messrs. Wilber Henderson and Barrett D. Randall, of Attorneys for the Defendant.

TRIAL PROCEEDINGS

The Court: You may proceed, Mr. Wagner.

Mr. Wagner: If the Court please, in the bill of

particulars which is filed in this case a number of errors occurred in [1] computations and they have been known by both of the parties to this matter for some time, and at this time we would like to make the necessary corrections. On page 5, at the top of the page is a total overcharge figure.

The Court: You will need to make these alterations. You will have to follow them (the Court addressing the Clerk).

Mr. Wagner: The figure \$3,007.98 as corrected should be \$1535.16.

On page 10 the total, \$1,069.41, as corrected should read \$1,060.07.

On page 18 the right-hand column about the middle of the page, the figure \$2,038.73 as corrected should read \$2,036.23.

And on page 23 of the bill of particulars about the middle of the page, the figure \$1954.80 as corrected should read \$1953.56.

On page 25, the right-hand column, the total figure of \$1320.34 as corrected should read \$1315.82.

On page 26 is a recapitulation which carries the figures as uncorrected. The figures as corrected should read \$1535.16, the first figure. As corrected the second one should read \$1060.07. The third figure stands as uncorrected. The fourth figure, \$2,038.73, as corrected should read \$2,036.23. The next figure, \$1954.80, should read \$1953.56, I guess it is. And the next figure, \$1320.34, should read \$1315.62. The total of all of those figures as corrected should read [2] \$15,444.55.

We would like also, your Honor, to amend paragraph V of plaintiff's third cause of action in the complaint so as to read, in line 16, in lieu of the figure \$48,477.09, as corrected should read \$46,-333.65.

Mr. Henderson: Will you repeat that, please?

Mr. Wagner: \$46,333.65.

In the prayer of the complaint, page 5, line 9, the same correction.

If the Court please, there are three causes of action in the complaint, the first being allegations laying a foundation for an injunction against the defendant for purchasing scrap steel under Price Regulation No. 4. We are at this time offering to dismiss as to the first cause of action. This, it might be noted, was a counterpart of the all scrap steel case.

The second cause of action is plaintiff's foundation for an injunction in connection with sales of gray iron castings, and the third cause of action is the action for the multiple damages on the overcharges.

Now, your Honor, the matter is at issue on the second amended answer of the defendant, which substantially denies all the material allegations of plaintiff's complaint and sets up five affirmative defenses. To these affirmative defenses the plaintiff has filed a motion to strike all of [3] them.

There has, as yet, been no pre-trial order entered in the matter. There is a large number of exhibits which plaintiff desires to introduce. If it is neces-

sary for us to dispose of any of the questions at this time we are prepared to do so.

The Court: I will reserve ruling on all legal questions. You can put in your exhibits in the usual way as you try the case.

Mr. Wagner: Very well, your Honor. Thank you. Call Mr. Glen Fox.

PLAINTIFF'S EVIDENCE

GLEN FOX

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. Where are you employed, Mr. Fox?

A. In the Office of Price Administration.

Q. And where? A. Portland.

Q. And how long have you been so employed?

A. Two years and a half. [4]

Q. For two years and a half? A. Yes.

Q. What is your present capacity, Mr. Fox?

A. At the present time I am Shoe Rationing Director.

Q. And outside of your present employment, what was your capacity?

A. At the beginning?

Q. Yes. A. Investigator.

Q. How long were you an investigator, Mr. Fox?

A. A year and a half.

(Testimony of Glen Fox.)

Q. Up until about a year ago you were continuously employed in the Portland District Office as an investigator?

A. That is true.

Q. In your capacity as an investigator did you have occasion to make an investigation of sales by the Crawford and Doherty Foundry Company?

A. Yes, sir.

Q. Are you acquainted with Mr. Card of that concern?

A. I am.

Q. Also Mr. Stirnweis?

A. I have met Mr. Stirnweis.

Mr. Wagner: Have this marked for identification.

(The statement headed "Prices effective before April 13, 1942," and signed Tuerck MacKenzie Co., [5] by William J. MacKenzie, Sec. Treas., so offered, was marked Plaintiff's Exhibit 1 for identification.)

Q. Handing you Plaintiff's Exhibit 1 for identification, Mr. Fox, will you identify that document, please. Describe what it is.

A. This is a list of prices. It is the base prices on castings from Crawford Doherty Company to the Tuerck MacKenzie Company.

Q. Who are the Tuerck MacKenzie Company, Mr. Fox?

A. They are builders of cement pipe making machines.

Q. Customers of Crawford & Doherty Company?

(Testimony of Glen Fox.)

A. They are customers of Crawford & Doherty Company.

Q. And how did you come into possession of that document?

A. I got it from the Tuerck MacKenzie Company. Mr. MacKenzie, the president, gave it to me.

Q. And what prices do you say that document indicates?

Mr. Henderson: Just a minute. If the Court please, the document obviously speaks for itself.

Mr. Wagner: Very well. I will withdraw the question.

The Court: That is all right. Take it down and let Mr. Henderson look it over. Then you can ask any questions about it you want to.

Mr. Wagner: We will offer the document.

The Court: Well, I want to know what it says.

[6]

Mr. Wagner: I beg pardon?

The Court: I want to know what it says. After he has seen it let him tell what it says.

Mr. Wagner: Yes. I might add at this time, your Honor, that Mr. MacKenzie, also Mr. Amos, Mr. Bates, and others, involving officers of the concerns which are customers of Crawford & Doherty, will be here this afternoon. If there is any further identification of these documents that is necessary they will be here to take care of that.

The Court: Go ahead and have him tell what it is.

The Witness: Well, these are the prices that were in effect——

(Testimony of Glen Fox.)

Mr. Henderson: If the Court please, he is not answering the question. That document speaks for itself.

The Court: I don't care whether it does or not. I want him to tell what he thinks or claims it is. Go ahead now.

The Witness: These are the prices——

The Court: Give some dates.

The Witness: Prices effective before April——

The Court: Effective by whom?

The Witness: Pardon?

The Court: What do you mean by "effective?"

The Witness: These are the prices that Crawford & Doherty charged Tuerck MacKenzie before April 13, 1942.

The Court: On what? [7]

The Witness: On Meehanite castings and different other castings that the Tuerck MacKenzie Company were buying from Crawford and Doherty.

The Court: All right. Now why do you say those prices were effective before that date? What do you base that on?

The Witness: I base it on the statement by Mr. MacKenzie.

The Court: That is upon MacKenzie's statement to you?

The Witness: And he signed this particular document.

The Court: Well, you had better prove that by MacKenzie when he gets here.

(Testimony of Glen Fox.)

Mr. Wagner: Very well.

The Court: Lay it aside for the present. No Give it back to Mr. Wagner.

Mr. Wagner: Have this document marked for identification, and hand it to the witness, please.

(The statement dated Sept. 29, 1942, signed "Tuerck MacKenzie Company, William J. MacKenzie, Sec. Treas.," so offered, was marked Plaintiff's Exhibit 2 for identification.)

Q. I ask you to describe what that document is and how it came into your possession.

A. It is a statement by Mr. William J. MacKenzie, of the Tuerck MacKenzie Company, and it outlines castings that come under the General "E" Meehanite classification, the [8] castings that the Tuerck MacKenzie Company were purchasing from Crawford & Doherty.

The Court: What date?

Mr. Wagner: Q. During what period of time?

A. This was dated April 13, 1942, and was merely to show the type of castings that came under the General "E" Meehanite classification.

Mr. Henderson: May it please the Court, I do not want to be taking up time; in view of your Honor's ruling on that there, that you wanted to hear about it, I didn't object, but if he is going to explain something other than——

The Court: Well, Mr. Henderson, I will take care of all of that. I just want to get this thing started.

(Testimony of Glen Fox.)

Mr. Henderson: Thanks.

The Court: Now that is a different paper than the one you just had? A. Yes, sir.

The Court: What is the number of the one he first had, Mr. Wagner, your 1?

Mr. Wagner: Yes; Plaintiff's Exhibit 1 for identification.

The Court: And this is Plaintiff's Exhibit 2 you are speaking from now? A. Yes, sir.

The Court: And that is a statement that Mr. MacKenzie gave you at the same time he gave you Plaintiff's Exhibit 1, is it, [9] or about the same time? A. About the same time, yes, sir.

The Court: And it has to do with the kind of castings rather than the prices?

A. That is right.

The Court: All right. Lay it aside.

Mr. Wagner: Q. Now Mr. Fox, did you make any request of Crawford & Doherty to verify or substantiate the prices that they were charging to Tuereck MacKenzie Company for their castings?

A. Yes, sir.

Mr. Wagner: Have that marked for identification.

(The copy of letter dated April 13, 1942, Crawford & Doherty Foundry Co. by V. O. Stirnweis, pres., to Tuereck MacKenzie Company, so offered, was marked Plaintiff's Exhibit 3 for identification.)

Q. Handing you Plaintiff's Exhibit 3, Mr. Fox,

(Testimony of Glen Fox.)

will you identify that and explain how it came into your possession.

A. This is a copy of a letter written from the Crawford & Doherty Company on April 13, 1942, to Tuerck MacKenzie, advising them that all previously quoted prices had been canceled and that the list prices quoted here—the prices quoted in this letter, would be effective as of April 13.

Q. Did you make a request from the Crawford & Doherty Foundry Company for that document there? [10]

A. I don't recall whether they gave it to me or whether this was a copy made from the files of Tuerck MacKenzie. I believe Mr. Card gave me a copy of it but I am not certain.

Q. This came into your possession then about the same time that Plaintiff's Exhibits 1 and 2 did?

A. Yes.

The Court: You may put that in, if you want to put it in. That may go in now.

Mr. Wagner: Very well.

The Court: You want to offer it?

Mr. Wagner: Yes.

The Court: It is admitted as Exhibit 3.

(The copy of letter so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 3.)

(Testimony of Glen Fox.)

PLAINTIFF'S EXHIBIT No. 3

Crawford & Doherty Foundry Co.

4604 S.E. Seventeenth Ave.

Portland, Oregon

April 13, 1942

Tuerck MacKenzie Co.

687 N. Thompson St.

Portland, Oregon

Gentlemen:

Effective April 14, 1942 all privously quoted prices on castings are hereby cancelled and the following schedule substituted therefor.

General "E" Meehanite castings .....	.11	per lb.
Cores and all other "B" Meehanite Castings.....	.125	"
Bend Jackets .....	.17	"
Bell End Pallets up to 12" .....	.11	"
Bell End Pallets over 12" .....	.12	"
Culvert Pallets up to 12" .....	.12	"
Culvert Pallets over 12" .....	.13	"
Irrigation Pallets up to 12" .....	.13	"
Irrigation Pallets over 12" .....	.14	"

Castings weighing under one pound each will be billed as one pound castings.

We shall do our utmost to furnish your requirements as in the past and are endeavoring to give you all the service we can under present conditions.

(Testimony of Glen Fox.)

Thanking you for past business and hoping we may serve you in the future, we are,

Very truly yours,

CRAWFORD & DOHERTY
FOUNDRY CO.

By V. O. STIRNWEIS

Pres.

VOS/maa

Mr. Wagner: Mark that, please.

(The copy of letter dated April 24, 1941, Crawford & Doherty Foundry Company by V. O. Stirnweis, Pres., to Tuereck MacKenzie Co., so offered, was marked Plaintiff's Exhibit 4 for identification.)

Q. Handing you Plaintiff's Exhibit 4 for identification, Mr. Fox, will you explain how that came into your possession, and identify the document, please.

A. Well, this is a copy of a letter from Crawford & Doherty to [11] Tuereck MacKenzie on April 24, 1941, which advised them that because of the increased costs——

The Court: What year? A. 1941.

The Court: The year before the other letters?

A. Yes, sir. They were reaching the crisis on their castings.

Mr. Wagner: Very well. We will offer that.

The Court: Admitted.

(Testimony of Glen Fox.)

(The copy of letter so offered and received, having been previously marked for identification, was marked received Plaintiff's Exhibit 4.)

PLAINTIFF'S EXHIBIT No. 4

Crawford & Doherty Foundry Co.

4604 S. E. Seventeenth Ave.

Portland, Oregon

April 24, 1941.

Tuerck MacKenzie Co.

687 N. Thompson St.

Portland, Oregon

Gentlemen:

On account of increased costs which have been accumulating for some time, we are forced to cancel existing price schedules effective immediately, and substitute the following, subject to change without notice.

"B" Mehanite, (cores etc.)	10¼c per lb.
Bend jackets	15c per lb.
Other "E" Meehanite castings	9¼c per lb.

We shall do our utmost to furnish your requirements as in the past and are endeavoring to give you all the breaks we can under present conditions.

Yours very truly,

CRAWFORD & DOHERTY

FOUNDRY CO.,

By V. O. STIRNWEIS

Pres.

VOS:C

(Testimony of Glen Fox.)

The Court: What is the control date of this case?

Mr. Wagner: Two dates. Covering a portion of it, your Honor, is March of 1942, and then after October 26th, 1943, the base period date was August 1, 1941, to February 1, 1942. That is under Maximum Price Regulation 244.

The Court: March, 1942, and after October, '43?

Mr. Wagner: After October 26, 1943—

The Court: The base date is what, you claim?

Mr. Wagner: August 1, 1941, to February 1, 1942.

The Court: To February 1, '42. I don't understand that.

Mr. Wagner: Well, Maximum Price Regulation 244 attempted to generally roll back prices to a previous—freeze to a [12] previous base period, so that instead of permitting the highest net prices that were charged during March of '42 it rolled them back to the highest net prices that were charged from August, '41, to February 1, 1942.

The Court: And that was done October 26, '43?

Mr. Wagner: That is right.

The Court: And that is Maximum Price Regulation what?

Mr. Wagner: 244.

The Court: What is the earlier one?

Mr. Wagner: General Maximum Price Regulation.

The Court: All right.

(Testimony of Glen Fox.)

Mr. Wagner: Will you mark that, please.

(The copy of letter dated August 21, 1941, Crawford & Doherty Foundry Co. to Tuerck MacKenzie Co., so offered, was marked Plaintiff's Exhibit 5 for identification.)

Q. Handing you Plaintiff's Exhibit 5 for identification, Mr. Fox, I ask you to identify that document and explain how it came into your possession.

A. This is a letter from Crawford and Doherty dated August 21, 1941. It is to Tuerck MacKenzie and it involves an advance in price of certain pallet castings. I believe it is a copy of a letter that Mr. MacKenzie, of Tuerck MacKenzie, gave me.

Mr. Wagner: We will offer it. [13]

The Court: It is admitted.

(The copy of letter so offered and received, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 5.)

PLAINTIFF'S EXHIBIT No. 5

Crawford & Doherty Foundry Co.

4604 S. E. Seventeenth Ave.

Portland, Oregon

Aug. 21, 1941

Tuerck MacKenzie Co.

687 N. Thompson St.

Portland, Oregon

Gentlemen:

Due to conditions beyond our control we find it

(Testimony of Glen Fox.)

necessary to revise prices on pallet castings as follows:

Bell End Pallets up to 12'' .10 lb. over 12'' .11 lb.

Culvert Pallets up to 12'' .11 lb. over 12'' .12 lb.

Irrigation Pallets up to 12'' .12 lb. over 12'' .13 lb.

Thanking you for past business and hoping we may serve you in the future, we are,

Very truly yours,

CRAWFORD & DOHERTY
FOUNDRY CO.

By V. O. STIRNWEIS
Pres.

VOS/maa

Mr. Wagner: Plaintiff's Exhibit 6 for identification.

(The statement dated July 20, 1942, signed William J. MacKenzie, so offered, was marked Plaintiff's Exhibit 6 for identification.)

Q. Mr. Fox, I am handing you Plaintiff's Exhibit 6 for identification and ask you to identify that document and explain how it came into your possession.

A. This is a statement made by William J. MacKenzie, of Tuerck MacKenzie Company.

Q. What date is it?

A. It is dated the 20th day of July, 1942. It is witnessed by John C. Failing.

The Court: What is it about? Just generally.

(Testimony of Glen Fox.)

A. The statement concerns the raise in price of castings from Crawford and Doherty to Tuerck MacKenzie.

The Court: All right.

Mr. Wagner: Q. At what time, Mr. Fox?

A. This is on June 26th.

Q. Of what year?

A. 1942. They billed pallets under 12 inches for 11 cents a pound. [14]

The Court: Well, we don't want the detail. It is just about raising prices.

The Witness: It concerns a raise in prices.

The Court: After June 26th?

A. No. During March—the raise in prices after March, 1942.

The Court: How did Mr. Failing happen to be on it?

A. He was an attorney I believe for the Tuerck MacKenzie Company.

The Court: A raise in prices after what date? Give me that again. A. After March, 1942.

The Court: All right.

The Witness: Subsequent to that.

The Court: All right. Lay that aside until Mr. MacKenzie comes.

Mr. Wagner: Mark that, please.

(The affidavit of William J. MacKenzie dated February 6th, 1943, so offered, was marked Plaintiff's Exhibit 7 for identification.)

(Testimony of Glen Fox.)

Q. Handing you Plaintiffs Exhibit 7 for identification, Mr. Fox, will you describe that document and identify it.

A. This is an affidavit. It is an affidavit by William J. MacKenzie.

The Court: Well, what purpose would an affidavit have in the case? [15]

Mr. Wagner: It was obtained during the course of the investigation, your Honor, and all of these documents together, this being the last one, form the basis of the computation which has been made by Mr. Fox, or under his supervision and direction.

The Court: Well, what is the subject matter of that affidavit?

Mr. Wagner: It covers all of those items that were sold that were not covered by the previous documents here.

The Court: Well, you expect to have Mr. MacKenzie verify it as of that date?

Mr. Wagner: Yes, I will do that.

The Court: And is there a date here that we should write down now that is in this affidavit?

Mr. Wagner: Will you explain that, Mr. Fox.

The Witness: Well, this was sworn to on the 6th day of February, 1943.

Q. What does it cover?

A. It concerns the raise in prices. He sets out what they charged at one time and then goes on to say what they charged after that.

The Court: Well, does it cover the whole period of the complaint? A. Yes, sir.

(Testimony of Glen Fox.)

Mr. Wagner: Yes. [16]

The Court: Tells the whole story of the relation between this company and——

Mr. Wagner: The raise of prices at this particular time.

The Witness: From August 1, 1941, to February 1, 1942, and during the month of March, 1942.

The Court: Does it cover everything that this case covers?

Mr. Wagner: Only as to the sales to Tuerek MacKenzie.

The Court: Yes.

Mr. Wagner: There were three other customers involved.

The Court: I understand.

Mr. Wagner: We will offer this.

The Court: No. We will lay it aside. That won't come in unless Mr. MacKenzie wants to adopt it for his own recollection.

Mr. Wagner: Very well, your Honor.

The Court: Lay it aside. Give it back to Mr. Wagner.

Mr. Wagner: Q. During the course of your investigation after receiving these various documents what was your next step in making this investigation?

A. We transcribed the invoices, the actual invoices that covered shipments from Crawford & Doherty to Tuerek MacKenzie.

Mr. Wagner: Very well. Mark that for identification.

(Testimony of Glen Fox.)

(The five sheets of statement, numbered 3 to 7, both inclusive, the first sheet headed "Invoices from Crawford-Doherty Foundry to Tuerck-MacKenzie," with an adding machine [17] slip attached, so offered, was thereupon marked Plaintiff's Exhibit 8 for identification.)

Q. Handing you Plaintiff's Exhibit 8 for identification, Mr. Fox, will you explain what those pages are.

A. Well, these are transcriptions of invoices.

Q. And where were they made?

A. They were made in the offices of Tuerck MacKenzie.

Q. And what dates are covered there?

A. August, 1942.

Q. To what? A. To October.

Q. Those were taken from the originals of invoices in the office of Tuerck MacKenzie Company?

A. Yes, sir.

The Court: You will have to bring those originals in if Mr. Henderson wants them.

Mr. Wagner: Yes, your Honor. They were subpoenaed sometime ago and I think it was quite definitely agreed that the gentlemen would be relieved from bringing all of these invoices in. They did on that occasion. There was a pre-trial and at that particular time I think it was agreed between the parties it would not be necessary to bring the originals in, in view of the fact that they were merely the foundation for the bill of particulars and for these transcriptions.

(Testimony of Glen Fox.)

Mr. Henderson: If the Court please, this matter can be [18] eliminated, I should think. We have already agreed to stipulate, and I am prepared to stipulate now, that the invoices as reflected by the bill of particulars, showing the item, the date, the rate and the prices charged are correct. So this, insofar as it relates to what he has said it relates, I have no objection to, but there are more things on there than he says. That is not confined strictly to the invoice. There is added to it other computations of other matters. So insofar as what he has addressed himself to, I will agree that the statement in the bill of particulars is correct.

The Court: All right. It is the same as this transcription?

Mr. Henderson: Well, as I say, there are other things added to it and of course I would object to that. If the other part, if the other columns are going to be considered by the Court I will object to it.

The Court: All right. We will see what Mr. Wagner wants to do with it. He has not offered it yet.

Mr. Wagner: Q. Will you explain, Mr. Fox, in making this transcription what captions are used across the top.

The Court: What are these other columns, Mr. Henderson?

A. Well, it shows the date——

The Court: Wait a minute.

Mr. Wagner: These computations include not

(Testimony of Glen Fox.)

only the invoice [19] number, and the date of the invoice, and kind of casting——

The Court: I am looking now at the bill of particulars.

Mr. Wagner: The ceiling price.

The Court: Tell me, what is on this transcription that is not on the bill of particulars? The columns on the bill of particulars are weights, price charged, ceiling, overcharge.

Mr. Henderson: Now of course you understood the ceiling and the overcharges are not what we are conceding.

The Court: All right. And those are the other two columns, Mr. Wagner?

Mr. Wagner: The ceiling and the overcharges apparently are all.

The Court: I get you.

Mr. Wagner: Yes.

Q. Now Mr. Fox, in making this particular transcription in this computation here, namely, Plaintiff's Exhibit 8 for identification, what was used by yourself in arriving at the indicated ceiling price or ceiling prices?

A. We used in this particular case, I believe, the prices that they charged during March, 1942.

Q. And where did you obtain those?

A. From invoices in the files of Tuerck MacKenzie Company.

Q. Did you make reference also to——

The Court: Invoices of the defendant?

A. Yes, sir. [20]

(Testimony of Glen Fox.)

Mr. Wagner: Q. Did you make reference also to the documents here that we have been discussing, Plaintiff's Exhibits for identification 1 to 7, inclusive?

A. No. This just shows what the March ceiling was supposed to be, and then the overcharge.

Q. Well, where did you get the March ceiling? That is what I am asking. Before you put it on there where did you get it?

A. We got it from the prices actually charged by Crawford & Doherty to Tuerck MacKenzie during March, 1942. We received those invoices from Tuerck MacKenzie, from Mr. MacKenzie.

Q. And those are the prices which you have indicated here? A. Yes, sir.

Q. Are those the prices that Mr. MacKenzie has indicated also in the previous documents that we have discussed here? A. Yes, sir.

Q. And those were used all the way through the transcription there? A. That is right.

Q. Then the other column captioned "Overcharge," how did you arrive at that?

A. We took the number of pounds at the price charged and took the number of pounds at the ceiling price and the difference between these two represented the overcharge.

Q. And those are the right-hand column, last column that is contained in that exhibit? [21]

A. Yes, sir.

Q. In that document. Have you totaled up the items indicated as being overcharges?

(Testimony of Glen Fox.)

A. Well, we totaled——

Q. With a tape, adding machine tape?

A. Oh, yes. This group here; do you want the amount?

Q. Yes. A. Represents \$1,535.16.

Q. And that covers what dates?

A. This is from August 21st to October 26th.

Q. 1942? A. Yes, sir.

Q. Very well.

The Court: What is your figure, one thousand thirty-five?

A. One thousand five hundred thirty-five sixteen.

Mr. Wagner: We will offer that.

The Court: It is admitted, subject to being connected up.

(The statement so offered and received, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 8.)

Mr. Wagner: Have this marked for identification.

(The twelve sheets of tabulated statements so offered, the first bearing the heading Tuerck MacKenzie Co., to which was clipped [22] an adding machine tape, was marked Plaintiff's Exhibit 9 for identification.)

Q. Handing you Plaintiff's Exhibit 9 for identification, Mr. Fox, will you explain what that document is. How many pages are there in it?

(Testimony of Glen Fox.)

A. This is a transcription of invoices from Crawford & Doherty to Tuerck MacKenzie, beginning October 28th, 1942, and going through to December 30, 1942.

Q. Was that transcription made by yourself, or under your direction?

A. It was made under my direction. Not all of it was made by me.

Mr. Henderson: May I interrupt? What was that first date, please.

The Witness: Pardon me?

Mr. Henderson: The first date?

The Witness: The first date was October 28th.

Mr. Henderson: Thank you.

Mr. Wagner: Q. Referring to the column "Ceiling Price," captioned "Ceiling Price," were the ceiling prices as indicated in that column arrived at in the same manner as the previous exhibit? A. Yes, sir.

Q. You not only used invoices during the basing period but also the documents described as Plaintiff's Exhibits 1 to 7, [23] inclusive, for identification? A. That is right.

Q. And then the computation of your column "Overcharges" was arrived at in the same manner? A. Yes, in the same manner.

Q. What is the total tabulation of the computation called column "Overcharges"?

A. \$1060.07.

Mr. Wagner: We will offer the exhibit.

(Testimony of Glen Fox.)

The Court: It is admitted subject to being connected up.

(The statement so offered and received, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 9.)

Mr. Wagner: Mark that for identification.

(The six sheets numbered 1 to 6, the first sheet being headed "Crawford—Doherty Invoices to Tuerck-MacKenzie Co.," numbered 1 to 6, inclusive, with an adding machine tape attached thereto, so offered, was marked Plaintiff's Exhibit 10 for identification.)

The Court: Why did you dismiss the first cause, Mr. Wagner?

Mr. Wagner: We determined to dismiss the first cause in this case, your Honor, at the same time we concluded the other [24] scrap iron case injunction suits.

The Court: You mean sometime ago?

Mr. Wagner: Yes.

The Court: What is the difference between the first cause and the second and third you are continuing to prosecute in this case?

Mr. Wagner: The second cause of action covers the sale of gray iron castings. The first cause of action covers purchases of scrap steel.

The Court: Of scrap?

Mr. Wagner: Yes.

The Court: The first covered scrap?

(Testimony of Glen Fox.)

Mr. Wagner: Purchases of scrap iron.

The Court: Oh, yes.

Mr. Wagner: The second covers sales of gray iron casting.

Q. Handing you Plaintiff's Exhibit 10 for identification, Mr. Fox, describe that document.

A. Well, this is a transcription of invoices from Crawford-Doherty Company to Tuerck-MacKenzie Company, beginning January 14, 1943, and going through to February 27, 1943.

Q. And did you arrive at the figures indicated as being ceiling prices in that document the same as you did in the previous exhibit?

A. Yes, sir. [25]

Q. Likewise a computation of the column indicated as being overcharges? A. Yes, sir.

Q. And what is the total of the column indicated as being overcharges? A. \$723.99.

Mr. Wagner: We will offer it.

The Court: It is admitted, subject to being connected up.

(The statement so offered and received, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 10.)

Mr. Wagner: Mark that for identification.

(The letter so offered, dated October 22, 1942, Bingham Pump Company to Office of Price Administration, Portland, Oregon, was marked Plaintiff's Exhibit 11 for identification.)

(Testimony of Glen Fox.)

Q. Handing you Plaintiff's Exhibit 11 for identification, you identify that document, Mr. Fox.

A. This is a letter written by the Bingham Pump Company to the Office of Price Administration, Portland, Oregon, on October 22, 1942. It is written by Mr. C. B. Amos, who is the Purchasing Agent of the Bingham Pump Company.

Q. Was that letter written at your request? [26]

A. I presume it was.

Q. Well, do you remember?

A. Yes, it was written at my request.

Mr. Wagner: We will offer the document, subject, of course, to Mr. Henderson's objection.

The Court: Well, I shall lay it aside. We won't rule on it now.

Mr. Wagner: I want this marked for identification.

(The affidavit of C. B. Amos, of Bingham Pump Company, dated February 1st, 1943, so offered, was marked Plaintiff's Exhibit 12 for identification.)

The Court: I will ask a question, please, for my information. What is the subject of that last letter?

Mr. Wagner: It indicates a price raise—a price raise to Bingham Pump Company by Crawford & Doherty Company.

The Court: Any dates?

Mr. Wagner: A 12%, approximately 12% rise on April 14, 1942. The letter is dated October 22, 1942.

(Testimony of Glen Fox.)

Q. Handing you Plaintiff's Exhibit 12 for identification, Mr. Fox, will you identify that document.

A. This is a statement from Mr. C. B. Amos, of the Bingham Pump Company, in which he—it is a sworn statement, in which he states about the prices that were in effect during May, 1941, and prices that were in effect during April, 1942. Now this is [27] dated the 1st day of February, 1943, and signed by Mr. Amos.

Q. Was that document used by you in the course of this investigation to establish prices?

A. Yes, sir.

Mr. Wagner: We will offer the document.

The Court: No. the man who made it can use it, if he wants to, for reference.

Mr. Wagner: We will withhold it, then, until Mr. Amos arrives.

The Court: Yes.

Mr. Wagner: Mark that.

(The two file cards so offered, each headed "Cast Iron Castings, Crawford & Doherty," and attached to one sheet of paper, were marked Plaintiff's Exhibit 13 for identification.)

Q. Handing you Plaintiff's Exhibit 13 for identification, Mr. Fox, will you identify that document, or those documents.

A. These are cards, file cards out of the files of the Bingham Pump Company.

(Testimony of Glen Fox.)

Q. And what do they indicate?

A. Prices that they were paying for castings to Crawford & Doherty during May, 1941, and April, 1942.

Q. Is there any indication as to what the March prices were from those documents?

A. There was no price change to Bingham Pump between May—— [28]

Mr. Henderson: If the Court please, the witness is not answering the question.

Mr. Wagner: Q. Is there any indication as to what the market prices were?

Mr. Henderson: Answer it "yes" or "no," and then go ahead. A. Yes.

Mr. Wagner: Q. Well then, go ahead and explain it. What is the indication?

A. Well, the indications are that there was no price change between May, 1941, and April, 1942.

Mr. Henderson: If the Court please, I move that that answer be stricken. It is not in that document he is reading from. I know by inspecting it.

The Court: Well, it will avoid controversy not to try to go any further with this witness. Let your Bingham witness vouch for it, if he wants to.

Mr. Wagner: Q. Where did you get those documents, Mr. Fox?

A. I got them from Mr. Amos, of the Bingham Pump Company.

Q. And you have had them in your possession ever since? A. Yes, sir.

(Testimony of Glen Fox.)

Mr. Wagner: We will offer them, of course, subject to the objection.

The Court: They may be laid aside until Mr. Amos comes.

Mr. Wagner: Mark that for identification. [29]

(The affidavit of Clifford B. Amos, dated February 6th, 1943, so offered, was marked Plaintiff's Exhibit 14 for identification.)

Q. Handing you Plaintiff's Exhibit 14 for identification, Mr. Fox, will you describe that document. Identify the document.

A. This is an affidavit made by Mr. Amos. It outlines his position with the Bingham Pump Company and details what was on those cards a moment ago, the prices charged during May, 1941, and April, 1942.

Q. Does that affidavit indicate your previous statement to the effect there had been no change between those dates?

A. It does.

Q. This document—is that a sworn document?

A. Yes, sir.

Q. And that was used by you in the course of this investigation?

A. Yes, sir.

Q. And the document has been in your possession ever since?

A. Yes, sir.

Mr. Wagner: We will offer the document.

The Court: Lay it aside. Mr. Amos may use it to refresh his recollection, if he wants to.

(Testimony of Glen Fox.)

Mr. Wagner: Mark that for identification.

(The statement so offered, consisting of 6 sheets, the first headed "Crawford Doherty Invoices to Bingham Pump Co.", was marked Plaintiff's Exhibit [30] 15 for identification.)

Q. Handing you Plaintiff's exhibit 15, Mr. Fox, will you identify and describe that document.

A. This is a transcription of invoices from Crawford & Doherty to the Bingham Pump Company, starting the 5th of January, 1943, and carrying through to the 10th of March, 1943.

Q. And from what was this transcription made?

A. Made from invoices.

Q. Original invoices?

A. Original invoices.

Q. Where?

A. From the files of the Bingham Pump Company, in their offices.

The Court: Is that covered in your bill of particulars?

Mr. Wagner: Yes.

The Court: You make the same stipulation, Mr. Henderson?

Mr. Henderson: Yes, your Honor.

Mr. Wagner: We have two other exhibits here of the same character.

The Court: All right.

Mr. Henderson: I wonder if counsel wants to get in at this time the total.

Mr. Wagner: Yes.

(Testimony of Glen Fox.)

The Court: Just call it off.

Mr. Wagner: The total is \$1315.82, as indicated by the tape. [31] I will have this identified as 16.

The Court: 15 will be admitted, subject to being connected up.

(The statement so offered and received, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 15.)

Mr. Wagner: Mark this 16.

(The statement, consisting of 14 sheets, numbered 18 to 31, both inclusive, the first headed "August, 1942—to Bingham Pump—Crawford & Doherty", so offered, was marked Plaintiff's Exhibit 16 for identification.)

Mr. Wagner: The total as indicated by the tape on that—read the total on the tape there. This is \$2,036.23, and the dates covered are August 7, 1942, to October 22, inclusive, 1942.

The Court: That is Plaintiff's Exhibit 16?

Mr. Wagner: Plaintiff's Exhibit 16.

The Court: That is made in the same way, witness, as the other one?

A. Yes, sir.

Mr. Wagner: Q. Is that right, Mr. Fox?

A. Yes, sir. [32]

The Court: He won't need it any further. Get up another one. That will be admitted, subject to being connected up.

(The statement so offered and received, hav-

(Testimony of Glen Fox.)

ing been previously marked for identification, was further marked received as Plaintiff's Exhibit 16.)

Mr. Wagner: Have this marked 17.

(The statement, consisting of 12 sheets, numbered 1 to 12, the first headed "Crawford Doherty Co. Invoices to Bingham Pump Co.", so offered, was marked Plaintiff's Exhibit 17 for identification.)

The Court: You can call the dates and the amounts, the same as you did before.

Mr. Wagner: Very well. It is a transcription covering invoices from 11/9/42, November 9th, 1942, to and including December 31, 1942.

The Court: Bingham Pump Company?

Mr. Wagner: Sales to Bingham Pump Company, the total of which amounts to \$1953.56.

The Court: That is the alleged overcharge?

Mr. Wagner: The alleged overcharges, as indicated by the tape.

The Court: \$1953.56. Admitted, subject to being connected up. [33]

(The statement so offered and received, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 17.)

Mr. Wagner: The next involves sales to Wilamette Iron & Steel Corporation. Have that marked for identification.

(Testimony of Glen Fox.)

(The affidavit of W. B. Porter so offered was thereupon marked Plaintiff's Exhibit 18 for identification.)

Q. Handing you Plaintiff's Exhibit 18, Mr. Fox, for identification, explain what that document is.

A. This is a statement from W. B. Porter, who is the purchasing agent of the Willamette Iron & Steel, and he——

Q. What is the date of the document?

A. That is dated January 26th, 1943.

Q. And what does it cover?

A. It covers prices paid Crawford & Doherty beginning June 25th, 1942.

Q. Until when?

A. September 30th, 1942.

Q. And what this used by yourself in the course of your examination and investigation of this matter? A. Yes, sir.

Q. And how was it used?

A. It was used to substantiate the fact that Crawford and Doherty had raised prices to Willamette Iron & Steel. [34]

Q. And does it form the basis of ceiling prices as indicated in your subsequent investigation?

A. Yes, sir.

Mr. Wagner: We will offer it.

The Court: That will be laid aside.

Mr. Wagner: That is the next one for identification.

(The affidavit of W. B. Porter dated

(Testimony of Glen Fox.)

February 6th, 1943, so offered, was marked Plaintiff's Exhibit 19 for identification.)

Q. Handing you Plaintiff's Exhibit 19 for identification, Mr. Fox, please identify that and explain how it came into your possession.

A. This is an affidavit sworn to by W. B. Porter.

Q. Who is Mr. Porter?

A. Well, he was the purchasing agent—contract engineer for the Willamette Iron & Steel Corporation.

Q. Did he make that affidavit at your instance?

A. Yes, sir.

Q. What does the affidavit cover?

A. It outlines the prices that the contract—

The Court: The date of the affidavit?

A. The date of the affidavit is the 6th day of February, 1943.

Mr. Wagner: Q. And what does it cover, what dates?

A. It sets forth the prices charged by Crawford & Doherty Company on June 25th, 1941. [35]

Q. And anything else?

A. And from August 1st, 1942, to February 1st, 1943.

Q. And was this document used by you during the course of this investigation?

A. Yes, sir.

Q. In what way?

A. Well, for the purpose of showing that the—

The Court: Oh, it doesn't matter. It may be laid aside and used, if needed, by the man who made it to refresh his recollection.

(Testimony of Glen Fox.)

Mr. Wagner: Very well. Your Honor. Have this marked for identification.

(The statement, consisting of 1 sheet, headed "Invoices from Crawford Doherty Co. to Willamette Iron & Steel Co.", so offered, was marked Plaintiff's Exhibit 20 for identification.)

Mr. Wagner: Also this one.

(The statement, consisting of 1 sheet, headed "Invoices from Crawford Doherty Co., to Willamette Iron & Steel Corp.", so offered, was marked Plaintiff's Exhibit 21 for identification.)

The Court: Can you tell what 20 is, Mr. Wagner? Mr. Wagner: 20 related— [36]

The Court: A transcription?

Mr. Wagner: Yes, a transcription of Willamette Iron & Steel Company sales.

The Court: And dates?

Mr. Wagner: Covering period October 26th, 1942, to and including December 31, 1942.

The Court: Amounts?

Mr. Wagner: The amount of the overcharges—I have \$3646.20 on a revision, which is Exhibit 21. That is a revision of the original transcription.

The Court: 21 is a revision of 20?

Mr. Wagner: Yes.

The Court: They will both be admitted, subject to being connected up.

(The two statements so offered and received, having been previously marked for identifica-

(Testimony of Glen Fox.)

tion were further marked received as Plaintiff's Exhibit 20 and Plaintiff's Exhibit 21, respectively.)

Mr. Wagner: Mark that for identification.

(The photostatic copies of four purchase orders of Willamette Iron and Steel Corporation to Crawford & Doherty Foundry Company, attached together, were thereupon marked Plaintiff's Exhibit 22 for identification.)

Mr. Wagner: Have you any objection to those going in? [37] They are photostats.

Mr. Henderson: Before I go into this, what was 21?

Mr. Wagner: 21 was a revision of 20.

Mr. Henderson: The same dates and the same amounts?

Mr. Wagner: Yes, covering the same transaction.

The Court: \$3646.20.

Mr. Wagner: Q. Handing you Plaintiff's Exhibit 22 for identification, Mr. Fox, will you describe and identify those photostats.

A. Well, these are photostatic copies of purchase orders from Willamette Iron and Steel, covering castings that they were buying—that they had bought from Crawford and Doherty Foundry Company. One is dated October 25, 1941; one is dated December 3, 1941, and one is dated December 30th, 1941, and—there are two of them dated December 30th, 1941.

(Testimony of Glen Fox.)

The Court: Where did you get them? Where did you find the originals?

A. Well, we took these from the Willamette Iron and Steel Corporation.

Mr. Wagner: Q. Records? A. Records.

Q. The originals are now in the possession of the Willamette Iron & Steel Corporation?

A. Yes.

Mr. Wagner: We will offer them. [38]

The Court: Well, they will have to be proved by the Willamette, unless Mr. Henderson wants to stipulate on them.

Mr. Henderson: Let me see them again, please. I might be able to.

Mr. Wagner: They indicate sales during the period August 1st, 1941, to February 1st, 1942—sales and delivery of casting.

Mr. Henderson: Counsel, may I—I don't quite understand. We have the invoices. Do we have the invoices in these complications, or transcriptions, that cover these? No, we wouldn't.

Mr. Wagner: I don't believe so.

Mr. Henderson: Wouldn't it be the invoice and not the order? The original of this is in the Willamette Iron and Steel Corporation's possession. I don't see the evidenciary value of them.

Mr. Wagner: Q. Mr. Fox, can you explain to us?

A. We have no—I don't think we have any invoices to cover those.

Q. Now the original documents that were the basis for these photostats were what? Were they

(Testimony of Glen Fox.)

originals, original purchase orders, or were they Willamette Iron & Steel Corporation's duplicate purchase orders?

A. Well, I don't recall.

The Court: Well, Crawford & Doherty would have the purchase orders.

Mr. Wagner: Crawford & Doherty would have the originals, but I believe these were taken from duplicates, duplicate originals [39] that necessarily were retained by Willamette Iron & Steel Corporation. But I believe Mr. Porter can tell us about that this afternoon, if there is any question about it.

The Court: Well, lay it aside. Your dates didn't jibe that you gave a minute ago, Mr. Wagner, with the dates Mr. Fox gave. He says they are dated October 25, '41/3/41, and two of them were dated 12/30/41.

Mr. Wagner: That is right.

The Court: You gave some dates both earlier and later than what he just said.

Mr. Wagner: Well, what I was referring to there, your Honor, were the base period dates for Maximum Price Regulation, which are more than the dates here—base period dates August 1st, '41, to February 1st, 1942. All of these sales were made within that base period.

The Court: Well, these bear then on sales made after October 26th, '42?

Mr. Wagner: That is right.

Mr. Henderson: Did your Honor rule on this?

The Court: Sir?

(Testimony of Glen Fox.)

Mr. Henderson: I understood you had ruled on this?

The Court: We laid it aside.

Mr. Henderson: Yes.

Mr. Wagner: Q. I would like to ask you one question further, Mr. Fox, in connection with this Plaintiff's Exhibit 22 for [40] identification. Was this used in your computation of overcharges in connection with sales to Willamette Iron and Steel Corporation? A. Yes, sir.

Mr. Wagner: This is for identification.

The Court: Do you want a figure there? Is that what you are going to ask?

Mr. Wagner: We have already had the Willamette Iron and Steel Corporation transcriptions in.

The Court: Which include those?

Mr. Wagner: No; which were based upon those.

The Court: Well, they include those transactions?

Mr. Wagner: Yes.

The Court: Sales made pursuant to those purchase orders?

Mr. Wagner: Sales made subsequent to the dates of these purchase orders.

The Court: All right.

Mr. Wagner: These form the basing dates.

The Court: All right.

Mr. Henderson: You haven't introduced, I understand, anything showing those orders were ever filled. You don't claim that?

(Testimony of Glen Fox.)

Mr. Wagner: Well——

The Court: Anybody who is a witness does not need to stay. They may come back at 1:30.

(The statement of Attorney William Bates dated [41] January 29, 1943, so offered, was marked Plaintiff's Exhibit 23 for identification.)

Mr. Wagner: Q. Handing you Plaintiff's Exhibit 23 for identification, Mr. Fox, will you describe and identify that.

A. Well, this is a statement made by Attorney W. Bates, who was a superintendent of the Iron Fireman Manufacturing Company. It concerns prices charged.

The Court: We are on another account now?

Mr. Wagner: Iron Fireman.

The Witness: It concerns prices charged during February, 1942.

Mr. Henderson: If the Court please, I presume now would be the appropriate time to object to anything that relates to Iron Fireman. There is no mention of the Iron Fireman in this complaint.

The Court: Did you know that this was coming up?

Mr. Henderson: Well, it was furnished in the bill of particulars but it is not in the complaint.

Mr. Wagner: No, I don't see it, either, in the complaint.

The Court: Do you want to amend?

Mr. Wagner: Well, I think that it is covered by the term "and others".

(Testimony of Glen Fox.)

The Court: You may amend, if you want to.

Mr. Wagner: Very well. I will, your Honor.

The Court: You can write out your amendment during the [42] recess.

Mr. Wagner: Thank you, your Honor.

The Court: Subject to Mr. Henderson's objection, which he can state at that time if he wants to. How much are you going to claim on Iron Fireman?

Mr. Wagner: Iron Fireman is \$3897.51.

The Court: Now you had better start over again, Mr. Fox.

Mr. Wagner: Yes, Mr. Fox.

The Witness: Well, this is a statement from Attorney W. Bates, who is the plant superintendent of the Iron Fireman Company, and the statement involves prices paid during 1942 and up to 1943.

The Court: What do you mean, "up to"? You mean during the year 1942?

A. Yes; during the year of 1942, March 27, 1942, to January 1, 1943.

The Court: Was there a sale on January 1, 1943?

A. Until. It says until January, 1943.

The Court: It would mean then during the year 1942, wouldn't it? A. Yes, sir.

Mr. Wagner: Q. And this document was used by yourself, was it, Mr. Fox, in making your subsequent computations?

A. Yes, sir.

Q. And transcriptions? [43]

(Testimony of Glen Fox.)

The Court: What was the date of that affidavit?

A. On the 29th of January, 1943.

Mr. Wagner: Q. And the figures indicated by that document were used by you as ceiling prices in your transcription of invoices?

A. Yes, sir.

Q. And subsequent sales? A. Yes.

Mr. Wagner: We will offer it.

The Court: Well, Mr. Bates can use it, if necessary, to refresh his recollection.

Mr. Wagner: Have this marked for identification.

(The statement of Attorney W. Bates dated October 16, 1942, so offered, was marked Plaintiff's Exhibit 24 for identification.)

The Court: Maybe I had better state we are going to start at 1:30. If you have any other witnesses you might be calling them now, if you had expected them to come at two. What have you got now, Mr. Fox?

A. Well, this is a statement made by Mr. Attorney W. Bates, of the Iron Fireman Company.

The Court: Date?

A. 16th of October, 1942.

The Court: Subject?

A. Subject is prices charged for castings from Crawford and [44] Doherty to the Iron Fireman Company.

The Court: Dates?

The Witness: Pardon me.

(Testimony of Glen Fox.)

Mr. Wagner: Q. What are the dates that are covered there?

A. It covers February, 1942, was when they started negotiations, and the first delivery was made March 27, 1942.

Q. And does that indicate the prices at which deliveries were made? A. Yes.

Q. Was that used by you in your subsequent computation of Iron Fireman transcriptions?

A. Yes, sir.

Q. For establishing the ceiling prices?

A. Yes, sir.

Q. For the particular casting that is indicated?

A. Yes, sir.

Mr. Wagner: We will offer that.

The Court: Well, the maker of it may use it, if he needs it.

Mr. Wagner: Mark that for identification.

(The statement so offered, consisting of 5 sheets, numbered 1 to 5, both inclusive, the first headed "Iron Fireman Mfg. Co. Indus. Div.", was marked Plaintiff's Exhibit 25 for identification.) [45]

The Court: Is this 25?

Mr. Wagner: Yes, your Honor.

The Court: Transcription? A. Yes, sir.

Mr. Wagner: Q. What does the transcription cover?

A. This covers October 27 through and including December 31st.

(Testimony of Glen Fox.)

Q. What years? A. 1940—1942.

The Court: Iron Fireman?

A. Iron Fireman.

The Court: Sales by Crawford and Doherty?

A. It is Crawford & Doherty sales to Iron Fireman.

The Court: Made up from invoices you find in Iron Fireman's records? A. That is right.

Mr. Wagner: Q. The column indicated "Ceiling price", where was that ascertained by yourself?

A. From records of prices charged during March, 1942, in the files of the Iron Fireman Company.

Q. Where any of the prices that are indicated there as the ceiling prices taken from Willamette Iron and Steel Corporation prices?

A. Some of them. There is some connection there but I don't recall what it is.

The Court: It will be received subject to being connected up.

Mr. Wagner: Thank you, your Honor. [46]

(The statement so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 25.)

Q. What is the amount indicated on the adding machine tape there?

Mr. Henderson: Counsel, aren't your claims——

The Court: Let's get the amount. Pardon me.

Mr. Wagner: The amount is \$3897.51.

The Court: You have them added up?

(Testimony of Glen Fox.)

Mr. Wagner: Yes. What did you say, Mr. Henderson?

Mr. Henderson: Aren't your claims on account of Iron Fireman under Maximum Price Regulation 244?

Mr. Wagner: Yes, your Honor, that is true.

Mr. Henderson: Was the witness testifying in regard to prices in March, 1944?

Mr. Wagner: Well, it was apparently a mistake on the witness' part. I don't think that would change the regulation nor the law, though.

Mr. Henderson: Well, I assume his Honor wants some evidence as to how—well, this being offered to affect the Iron Fireman it seems to me like it ought to be connected up some way.

Mr. Wagner: There may be an error, or a misstatement on my part, with respect to the effective date of M. P. R. 244.

Mr. Henderson: It is October 26th?

Mr. Wagner: 1942.

Mr. Henderson: Yes. [47]

Mr. Wagner: Yes. If I said 1943 I would like to have the record——

The Court: Well, you did say '43.

Mr. Wagner: Well, it is '42.

The Court: Now to meet Mr. Henderson's point, your transcription of sales, beginning on the day after the effective date of M. P. R. 244 on October 27th——

Mr. Wagner: Yes, sir.

(Testimony of Glen Fox.)

The Court: And run through that year to 12/31/42?

Mr. Wagner: That is right.

The Court: Now you base your ceiling price—you find your ceiling price based on the sales between August 1, '41, and February 1, '42. Right?

Mr. Wagner: That is right.

The Court: And where did you find this?

Mr. Wagner: They are Willamette Iron and Steel Corporation——

Mr. Henderson: Well, I think the witness ought to testify, if he is going to testify.

The Court: All right. Now we have got that clear. The witness says he does not know, so it hasn't been covered.

Mr. Wagner: Let's have this marked for identification.

(The photostatic copy of Purchase Order of Willamette Iron and Steel Corporation to Crawford & Doherty Foundry Company, dated June 25, 1941, with two additional sheets [48] of photostatic copy of agreement made June 25, 1941, between Willamette Iron and Steel Corporation and Crawford & Doherty Foundry Co. and "Escalator Clause", attached, were marked Plaintiff's Exhibit 26 for identification.)

Q. Do you identify that document, Plaintiff's Exhibit 26 for identification, Mr Fox?

A. This is a photostatic copy of a contract or

(Testimony of Glen Fox.)

purchase order placed by Willamette Iron and Steel on June 25, 1941, with the Crawford & Doherty Foundry Company, and it covers items that were—this order was to have been held on file, I believe, and orders shipped against it.

Mr. Henderson: Now just a minute.

Mr. Wagner: Just identify the document itself.

The Witness: That is the document.

Q. What is the attachment to the purchase order?

A. Well, the second page is a statement by—well, it is a contract. It is a contract between the Willamette Iron and Steel and the Crawford & Doherty Company.

Q. Did you obtain this photostatic copy from the original? Was it made under your direction?

A. Well, I received it from the Willamette Iron & Steel.

Q. That is, the original? A. Yes.

Q. Then you had this photostat made of it? [49]

A. Yes.

Q. And who are the signatories to the contract?

A. C. H. Pape; he is for the first party, Willamette Iron and Steel Corporation; and Don B. Card, for the Crawford and Doherty Foundry Company.

Mr. Wagner: Do you have any objection to that contract going in, Mr. Henderson?

Mr. Henderson: Counsel and your Honor, I though that was just another one of those purchase orders. I didn't know there was a contract attached.

(Testimony of Glen Fox.)

Mr. Wagner: The contract, with the escalator clause, is attached.

Mr. Henderson: We admit that the——

The Court: It is admitted.

Mr. Henderson: —that it is a photostatic copy of it.

(The photostatic copies of documents so offered and received, having been previously marked for identification, were further marked received as Plaintiff's Exhibit 26.)

PLAINTIFF'S EXHIBIT No. 26

PURCHASE ORDER

WILLAMETTE IRON AND STEEL CORPORATION

2880 N. W. FRONT AVENUE
PORTLAND, OREGON



To: Crawford & Doherty Foundry Co.

4604 S.E. 17th Ave.

Portland, Oregon

PURCHASE ORDER No. 10598

TO BE SHOWN ON ALL
INVOICES, SHIPPING
PAPERS, PACKAGES, ETC.

DATE June 25 1941

TERMS Regular F.O.B. Our Plant

DELIVER TO Machine Shop

SHIP VIA DATE WANTED See Below RENDER INVOICES IN 5
TRANSPORTATION CHARGES MUST BE PREPAID. IF QUOTED F.O.B. SHIPPING POINT, ATTACH ORIGINAL PAID FREIGHT BILL TO INVOICE

ITEM	QUANTITY	UNIT	DESCRIPTION	UNIT PRICE	AMOUNT
			Castings and Patterns as per list:		
	600	Only	Dwg. No. 8893-4 <i>Feet Trip</i> Patt. No. #24484 ✓		
	50	"	" 18132-8 <i>Guide Bolt</i> " 24488 ✓		
	50	"	" 18142-8 <i>H.P. Valve Ch. Cover</i> " 24542 ✓		
	600	"	" 18143-8 <i>Liner</i> " 24505 ✓		
	150	"	" 18184-8 <i>Slipper</i> " 24585 ✓ <i>part coming</i>		
	50	"	" 18243-8 <i>Sleeve</i> " 24673 ✓		
	50	"	" 18244-8 " " 24674 ✓		
	50	"	" 18268-8 <i>Bush</i> " 24701 ✓		
	50	"	" 18294-8 <i>Offset</i> " 24728 ✓		
	150	"	Crosshead Guide Drain Funnels		
	100	"	Dwg. No. 18309-8 Patt. No. #24735 ✓		
			M.P. & L.P. Valve Rod Guide Domes		
			Dwg. No. 18262-8 Patt. No. #24699 ✓		
			Price - .08 per lb.		
			Inspection: See Para. 5 of Purchase Agreement.		
			Delivery: 1 Casting only off each pattern shall be furnished within 15 days after receipt of patterns, after these castings have been checked and approved, production shall be, two sets or more per month for the next three months, and then four sets or more per month until completion of order.		
			1/50 of the above quantities constitutes 1 set.		
			Confirming Order by Mr. Page		

*From Mr. Murdock
all mail cancellation on
est 2 items. Order to com
from Dr. & Harwick. Said to
advise him immediately if he don't
order from Harwick promptly.*

24901

FOR COMPANY USE ONLY

JOB ORDER **DELIVER GATE #2**

DEPARTMENT OR SHOP

PURPOSE FOR WHICH ORDERED

ORIGINATED BY **WACH, SHOP**

ON REQUESTION NO.

WILLAMETTE IRON AND STEEL CORPORATION

BY *Em Oyle*
In testimony whereof, and in
ing this regulation, contact
MR. G. K. MURDOCH

(Testimony of Glen Fox.)

Plaintiff's Exhibit No. 26—(Continued)

This Agreement made in duplicate this 25th day of June, 1941, by and between Willamette Iron and Steel Corporation, first party, and Crawford & Doherty Foundry Co., second party.

Witnesseth: That the parties hereto, in consideration of the covenants and stipulations herein-after contained, mutually agree as follows:

(1) Second party agrees for the price and payments therein specified to furnish all the material and perform the work and labor necessary to fulfill the terms and specifications set forth in detail in the annexed purchase order No. 10594 of first party, dated June 25th, 1941, which purchase order with its attached specifications, drawings, blue prints and/or other data or documents is hereby made a part of this agreement.

(2) The said purchase order and this agreement shall be performed and completed promptly within the time specified in said job order. Time and strict performance are made of the essence of this agreement. Second party agrees to prosecute the work on over time basis if necessary to complete the work within the specified time.

(3) Payment to second party shall be made upon completion and delivery to first party or at the time and in the manner specified in said purchase order.

(4) First party by written order may make changes or modifications in the designs, specifica-

(Testimony of Glen Fox.)

Plaintiff's Exhibit No. 26—(Continued)

tions, drawings or blueprints within the general scope of this contract. If such changes cause an increase or decrease in the amount due under this contract or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly.

(5) All material and workmanship shall be subject at any time to inspection and/or tests by first party or its nominees; The United States Maritime Commission, and Gibbs & Cox Inc., its agent; The American Bureau of Shipping and/or The Bureau of Maritime Inspection and Navigation. Defective and unsatisfactory material and/or workmanship may be rejected by first party or its nominees and shall be promptly corrected or replaced by second party, as ordered by first party.

(6) All material shall be of the best grade and all work shall be performed in a skilled and first class workmanlike manner.

(7) Second party agrees to comply with all pertinent United States and State laws, rules and regulations as to hours, wages and working conditions and especially the Walsh-Healy Act and all social security and compensation laws.

(8) The second party shall not assign or transfer this contract or sublet any part of the work covered hereby.

(9) The second party shall be responsible for

(Testimony of Glen Fox.)

Plaintiff's Exhibit No. 26—(Continued)

and assumes all damages to persons or property that occur in connection with their prosecution of the work and shall be responsible for the proper care and protection of all materials and work performed until completion and final acceptance.

(10) Performance and delivery shall be made by second party free of all liens of materialmen, mechanics and laborers.

Willamette Iron and Steel Corporation.

By C. H. PAPE,

First Party.

CRAWFORD & DOHERTY
FOUNDRY CO.,

By DON B. CARD,

Secy.-Treas.,

Second Party.

Escalator Clause

(1) The contract price shall be subject to adjustments for ~~changes~~ changes in material and labor cost, such changes to be computed separately. Provided however, that the Vendor shall act promptly to purchase as much material as practicable at the prevailing price at the date this commitment is ratified by the Buyer and in respect to any balance of material, purchase will be made as promptly as practicable. The detailed method to be followed in the administration of this adjustment is to be mutually agreed upon, consideration in this connection to be given to the method used by the Navy and the United

(Testimony of Glen Fox.)

Plaintiff's Exhibit No. 26—(Continued)

States Maritime Commission in similar Commitments, all subject to the following understandings:

1st. Any increase or decrease on account of labor costs shall be limited to an amount not exceeding that represented by the percentage increase or decrease from time to time, over the figures given at the time of approval of this commitment by the buyer, in the index of average hourly earnings in all manufacturing industries (durable goods) as compiled by the United States Department of Labor, Bureau of Labor Statistics. The Buyer will obtain said index for the month in which this commitment is ratified and will determine to the nearest one-tenth of one percent any increase or decrease in said index occurring in any month during the course of the performance of the work under this commitment, and the price shall be adjusted by an amount equal to the expenditures made for direct labor employed in the performance of work hereunder in any month, multiplied by the increase or decrease in such index rate occurring in such month as determined by the Buyer.

2nd. Any increase or decrease on account of material costs shall be limited to an amount not exceeding that represented by the percentage increase or decrease from time to time, over the figures given at the time of approval of this commitment by the buyer, in the index numbers of the wholesale prices for the Metals and Metal Products Group of Commodities, as compiled by the United States

(Testimony of Glen Fox.)

Plaintiff's Exhibit No. 26—(Continued)

Department of Labor, Bureau of Labor Statistics. The Buyer will obtain said index for the month in which this commitment is ratified and will determine to the nearest one-tenth of one percent any increase or decrease in said index rate occurring in any month during the course of the performance of the work under this commitment, and the price shall be adjusted by an amount equal to the expenditures made for materials used in the performance of the work hereunder in any month, multiplied by the increase or decrease in such index rate occurring in such month as determined by the Buyer.

Mr. Wagner: Then will you admit, Mr. Henderson, that Plaintiff's Exhibit 22 for identification, which are purchase orders, were purchase orders that were executed pursuant to that contract?

Mr. Henderson: Mr. Reporter, will you please read that.

(Last statement by Mr. Wagner read.) [50]

Mr. Henderson: I can't admit anything like that. I don't know why, or how Willamette Iron & Steel do their business. I am representing Crawford & Doherty. What they make out in their office I am not in a position to admit. I don't know.

Mr. Wagner: Very well.

(Testimony of Glen Fox.)

Mr. Henderson: I will produce, or anything produced by Crawford & Doherty I will be very glad to indicate our position with respect to that, as I did with respect to that contract that was signed by Crawford & Doherty, by Mr. Card, a photostatic copy of which is attached to Exhibit 26.

Mr. Wagner: Q. Mr. Fox, in ascertaining ceiling prices in the instances of these four purchases of Crawford & Doherty Company, in your investigation did you verify these documents, referring to Plaintiff's Exhibit 1 for identification, did you verify the fact that those were the prices in effect before April 13th, 1942, from any original records?

A. Yes, sir.

Q. To what original records did you go to verify them?

A. The original invoices in the files of the Tuerck MacKenzie Company.

Q. The original invoices. And what did your investigations of those original invoices disclose? Did they disclose the true prices——

A. The proof that these were the prices charged prior to April 13th, 1942. [51]

Q. The highest prices? A. Yes, sir.

Q. Did you examine all of the invoices that were in the files of Tuerck MacKenzie Company from the Crawford & Doherty Company in connection with sales and deliveries of castings?

A. We examined all the original invoices that covered purchases during March, 1942.

(Testimony of Glen Fox.)

Q. Did you also cover original invoices in those files during the period August 1st, 1941, to February 1st, 1942? A. Yes, sir.

Q. Referring to Plaintiff's Exhibit 2 for identification and Plaintiff's Exhibit 7 for identification, and Plaintiff's Exhibit 6 for identification, did you pursue the same method in ascertaining the variety of the statements contained in those documents?

A. I don't quite understand.

Q. Did you make an examination of invoices, original documents in the files of Tuerck MacKenzie Company during March of 1942 and during the period August 1st, 1941, to February 1st, 1942, to see whether or not the prices indicated in those Exhibits that you have there—what are they, Exhibits 6, 7 and 8? A. 1, 2 and 3.

Q. —to determine whether or not the statements contained in those documents were true?

A. Yes, sir.

Q. You did that; and what did you find? [52]

A. I found that they were true.

Q. They are true. You examined all of the invoices during those periods in the file of Tuerck MacKenzie Company? A. Yes, sir.

The Court: And they were the highest prices?

Mr. Wagner: Q. And that those were the highest prices? A. Yes, sir.

Mr. Wagner: That is all with those exhibits.

Q. Was that method employed by you in your investigation likewise in connection with sales to the Bingham Pump Company, Mr. Fox?

(Testimony of Glen Fox.)

A. Yes, sir.

Q. And covering the same period?

A. Yes, sir.

Q. And what did you ascertain from your investigation of the Bingham Pump Company's files?

A. Referring to the Bingham Pump Company, we went through all of the invoices covering castings delivered during March, 1942.

Q. Referring now to Plaintiff's Exhibit 11, Plaintiff's Exhibit 12, Plaintiff's Exhibit 13 and Plaintiff's Exhibit 14, all for identification, did your examination of original invoices from the files of the Bingham Pump Company disclose that the statements contained in those documents were true?

A. Yes, sir.

Q. And that those prices before indicated by those particular [53] documents were the highest prices charged during the respective periods, August 1st, 1941, to February 1st, 1942, and March of 1942?

A. Yes, sir.

The Court: With that verification you might put those in now.

Mr. Wagner: Thank you, your Honor.

The Court: Subject to any objection Mr. Henderson cares to state.

Mr. Wagner: We will renew our offer, Mr. Henderson. We renew our offer also of Bingham Pump Company and Tuerck MacKenzie Company's.

The Court: I intended to include the Tuerck MacKenzie and Bingham, he just having verified that particular one.

(Testimony of Glen Fox.)

Mr. Henderson: If the Court please, may I take just a minute? There are some conclusions stated here I want to see.

The Court: I think we may as well adjourn now. Come back at 1:30.

Mr. Henderson: So that I may understand your tender, 12, 13, 14, 11——

Mr. Wagner: Also 2.

Mr. Henderson: 2.

Mr. Wagner: 6, 7 and 1.

Mr. Henderson: On the assumption his testimony of an examination of the books could have established the truthfulness [54] of the statements contained in these exhibits; is that right?

Mr. Wagner: And the fact that the prices indicated there as being the highest prices during the respective business periods were the highest prices.

Mr. Henderson: Are you offering these for any other purpose than the prices or are you offering them for the contents of the entire Exhibit? I assume you are offering it for the contents of the entire Exhibit, aren't you?

Mr. Wagner: Yes. The contents deal entirely with the prices.

Mr. Henderson: I will state my position when we reconvene.

(Thereupon, at 11:55 o'clock A.M. a recess was taken until 1:30 o'clock P.M. of this day, Tuesday, December 12th, 1944, at which time the Court convened and the following further proceedings were had herein:)

GLEN FOX

thereupon resumed the witness stand as a witness in behalf of the plaintiff and further testified as follows

Direct Examination (Continued)

Mr. Wagner: If the Court please, I think just prior to the noon recess Mr. Henderson indicated there were some conclusions that were included in the various exhibits that the Court entered. I didn't know whether he wanted to make inquiry or not. [55]

Mr. Henderson: No. If the Court please, I have examined that further and the conclusions are of no significance, so I will make no point on that.

Mr. Wagner: I think I did mention the numbers. If not, I would like to have them in the record. The exhibits which are now admitted, if the Court please, are Plaintiff's Exhibit 1, 6, 7, 11, 12, 13, 14 and 2; all pertaining to base prices of the Tuerck MacKenzie Company and Bingham Pump Company.

(The documents so offered and received, having been previously marked for identification, were marked received as Plaintiff's Exhibits 1, 2, 6, 7, 11, 12, 13 and 14, respectively.)

(Testimony of Glen Fox.)

PLAINTIFF'S EXHIBIT No. 1

BASE PRICES ON CASTINGS FROM CRAWFORD
DOHERTY CO. TO TUERCK MacKENZIE CO.

Prices Effective Before April 13, 1942

General "E" Meehanite castings .....	.0925 per lb.
Cores and all other "B" meehanite castings.....	.1025 "
Bend Jackets .....	.15 "
Bell End pallets up to 12" .....	.10 "
Bell end pallets over 12" .....	.11 "
Culvert pallets up to 12" .....	.11 "
Culvert pallets over 12" .....	.12 "
Irrigation pallets up to 12" .....	.12 "
Irrigation pallets over 12" .....	.13 "

TUERCK MacKENZIE CO.
By WILLIAM J. MacKENZIE
Sec.-Treas.

PLAINTIFF'S EXHIBIT No. 2

Sept. 29, 1942

Witness

Glen Fox

Sec.-Treas.

I, William J. MacKenzie, President of the Tuerck MacKenzie Co, located at 687 N. Thompson St., Portland, Oregon, certify to the office of Price Administration an agency of the U. S. Government, that as Sec. Treas. of the above company I have access to, and am familiar with the book keeping system & general office methods used by the Tuerck

(Testimony of Glen Fox.)

Mackenzie Co. I am thoroughly familiar with each & every item The Tuerck MacKenzie Co. buys from the Crawford Doherty Foundry Co. I also know exactly where each item we buy from the Crawford Doherty Co., fits into the machines that we assemble.

I place the items on Crawford Doherty invoices in the classifications specified in their letter to us of April 13, 1942 as follows:

The invoices that come under the General E. Meehanite Castings classification are as follows:

#26392	Dated	3/26/42	Totaling	35.80	
#25760	"	3/26/42	"	12.49	
26394	"	3/26/42	"	12.49	
26391	"	3/26/42	"	48.75	
26395	"	3/27	"	69.47	
26396 }	"	3/27	"	9.25	
25759 }	"	3/27	"	9.25	
26440	"	3/31	1209# "	111.85	
26439	"	3/31	"	104.25	
26637	"	4/15	"	45.33	
26638	"	4/17	"	140.05	
26618	"	4/28	"	93.06	
26654	"	4/29	"	59.29	
26645	"	4/30	"	71.50	
26647	"	4/30	"	185.74	
26640	"	4/30	"	87.60	947#
26643	"	4/30	"	51.62	558#
26652	"	4/30	"	91.30	
26650	"	4/30	"	90.42	
26642	"	4/30	"	210.07	
26646	"	4/30	"	114.33	
26653	"	4/30	"	16.94	
26648	"	4/30	"	209.24	
26651	"	4/30	"	101.86	
26753	"	5/15	"	244.97	
26818	"	5/21	"	107.36	

(Testimony of Glen Fox.)

26797	“	5/27	“	68.82	
26819	“	5/27	“	88.11	801#
26795	“	5/27	“	32.84	
27049	“	6/3	“	111.54	
27050	“	6/9	“	123.75	
27051	“	6/12	“	162.47	
27064	“	6/30	“	90.86	826#
27054	“	6/26	“	73.26	
27485	“	8/27	“	129.58	

The above classification applies to the invoice that we have received from Crawford Doherty Foundry this year 1942. Items on their invoice that do not come under these the above classification, are identified by pacific prices as per letter Crawford Doherty Foundry under date April 13, 1942.

TUERCK MacKENZIE COMPANY
WILLIAM J. MacKENZIE,
Sec. Treas.

PLAINTIFF'S EXHIBIT No. 6

I, William J. MacKenzie, Manager of the Tuerck-MacKenzie Company, located at 687 N.E. Thompson Street, Portland, Oregon, do hereby certify to the Office of Price Administration, an agency of the United States Government, that Crawford & Doherty Foundry Company of 4606 S.E. 17th Avenue on June 26, 1942, billed the Tuerck-MacKenzie Company castings for cores at the rate of 12½ cents a pound; that on March 31, 1942 and previous dates, they billed these same cores for 10¼ cents a pound. That on June 26, 1942, they billed pallets, under

(Testimony of Glen Fox.)

12 inches, at 11 cents a pound; that on March 31, 1942, and prior thereto, they billed the same pallets at 10 cents a pound.

That on June 30th they billed B.E. bases and bells at 11 cents a pound and on March 31, 1942 they billed similar bells at 9¼ cents a pound. I further state that on April 13, 1942, Crawford & Doherty wrote us making quotations which were higher than those in effect on March 1, 1942, and have billed orders received by them after April 13, 1942 at the prices quoted in their letter of that date, and have not reduced their prices since the declaration of a price ceiling.

In many of the articles manufactured by Tuerck-MacKenzie Company, the castings which we have been buying from Crawford & Doherty for several years constitute the major part of the cost of the finished article, and it will be impossible to buy them at the increased price from Crawford & Doherty unless we are allowed to make similar raises in our ceiling prices. On other articles on which the cost of labor is a larger factor than the cost of castings, the effect of a raise in the price of the castings would not be so drastic, but on certain articles which we are furnishing to contractors who are doing work for the Army and Navy, our ceiling prices must be raised or the manufacturing of these articles must be discontinued if Crawford & Doherty are permitted to raise their prices to us.

I have read the above statement and believe it

(Testimony of Glen Fox.)

to be true and accurate to the best of my knowledge and belief and I have made the above statement freely and willingly.

Dated this 20 day of July, 1942.

Witness

JOHN C. FAIRLING,
Signed WILLIAM J. MacKENZIE.

PLAINTIFF'S EXHIBIT No. 7

AFFIDAVIT

United States of America

District of Oregon—ss.

I, William J. MacKenzie, being first duly sworn depose and say as follows:

That I am Secretary and Treasurer of Tuerck-MacKenzie Co., located at 687 N. Thompson St., Portland, Oregon, and that as Secretary and Treasurer of the above company, I have full access to, and am thoroughly familiar with, the bookkeeping system and general office methods used by Tuerck-MacKenzie Co.; that as Secretary and Treasurer of the above company I am charged with management of the office which includes the issuing of Purchase Orders, the accounting and the final payment of all accounts. I am thoroughly familiar with each and every item that the Tuerck-Mackenzie Co. buys from the Crawford & Doherty Foundry Co. I also

(Testimony of Glen Fox.)

know exactly to what use we put every item we buy from Crawford & Doherty Foundry Co.

According to our records and the correspondence we have received from Crawford & Doherty Foundry Co., also from the invoices in our files which we have received from them, I find that during the period from August 1, 1941 to February 1, 1942, and also during the entire month of March, 1942, the highest prices charged and paid for by us for castings from Crawford & Doherty Foundry Co. are as follows:

General "E" Meehanite Castings .....	.0925 per lb.
Cores and all other "B" Meehanite Castings.....	.1025 "
Bend Jackets .....	.15 "
Bell End Pallets up to 12" .....	.10 "
Bell End Pallets over 12" .....	.11 "
Culvert Pallets up to 12" .....	.11 "
Culvert Pallets over 12" .....	.12 "
Irrigation Pallets up to 12" .....	.12 "
Irrigation Pallets over 12" .....	.13 "

On April 14, 1942 we received a letter from the Crawford & Doherty Foundry Co. which stated as follows:

"April 13, 1942

Tuerck-MacKenzie Co.
687 N. Thompson St.
Portland, Oregon

Gentlemen:

Effective April 14, 1942, all previously quoted prices on castings are hereby cancelled and the following schedule substituted therefor.

(Testimony of Glen Fox.)

General "E" Meehanite castings.....	.11	per lb.
Cores and all other "B" Meehanite Castings.....	.125	"
Bend Jackets .....	.17	"
Bell End Pallets up to 12" .....	.11	"
Bell End Pallets over 12" .....	.12	"
Culvert Pallets up to 12" .....	.12	"
Culvert Pallets over 12" .....	.13	"
Irrigation Pallets up to 12" .....	.13	"
Irrigation Pallets over 12" .....	.14	"

Castings weighing under one pound each will be billed as one pound castings.

We shall do our utmost to furnish your requirements as in the past and are endeavoring to give you all the service we can under present conditions.

Thanking you for the past business and hoping we may serve you in the future, we are,

Very truly yours,

CRAWFORD-DOHERTY
FOUNDRY CO.

By V. O. STIRNWEIS,
Pres."

VOS/maa

The schedule of prices which became effective April 14, 1742 has carried through and has been the same up until the present time.

WILLIAM J. MacKENZIE.

Subscribed and sworn to before me this 6th day of February, 1943.

[Seal]

J. L. DAVIS,

Notary Public for Oregon.

My commission expires Feb. 10, 1945.

(Testimony of Glen Fox.)

PLAINTIFF'S EXHIBIT NO. 11

Bingham Pump Company
General Offices and Factory
Southeast Seventh at Main Street
Portland, Oregon

Manufacturers of Centrifugal—Turbine—Propeller Hipress—Vacuum Pumps.

October 22, 1942

Office of Price Administration
1224 Bedell Building
Portland, Oregon

Gentlemen:

The undersigned, as Purchasing Agent, of the Bingham Pump Company, Manufacturers of Pumps at their factory located at 705 S. E. Main Street, Portland, Oregon, hereby certifies that the above Company have been Purchasing Gray Iron and Meehanite Castings from the Crawford & Doherty Foundry Company since 1935; and further certifies that the schedule of prices for Castings were raised approximately 12% on April 14, 1942 and have not since been reduced.

Yours very truly

BINGHAM PUMP COMPANY

C. B. AMOS

CBA:AMS

C. B. Amos

Purchasing Agent

(Testimony of Glen Fox.)

PLAINTIFF'S EXHIBIT NO. 12

I, C. B. Amos of Bingham Pump Company, Portland, Oregon hereby represent and state to Glen E. Fox, who is known to me as an investigator of the Office of Price Administration, as follows:

That I am the Purchasing Agent of the Bingham Pump Company of 705 S. E. Main Street, Portland, Oregon, and that as Purchasing Agent of the above Company I have full access to, and am thoroughly familiar with the bookkeeping system and general office methods used by the Bingham Pump Company; that as Purchasing Agent of the above Company, I am charged with originating requisitions and for placing them with the different suppliers that furnish the Bingham Pump Company with materials. I am thoroughly familiar with each and every item that the Bingham Pump Company buys from the Crawford & Doherty Foundry Company. In my position I am charged with the responsibility of seeing that all prices are checked against original purchase orders.

According to our records and the correspondence we have received from Crawford & Doherty Foundry Company, also from the invoices in our files which we have received from them, I find that during the period from August 1, 1941 to February 1, 1942, the highest prices charged and paid for by us for castings from Crawford & Doherty Foundry Company are as follows:

(Testimony of Glen Fox.)

5-14-41

CAST IRON CASTINGS

Crawford & Doherty

1# to 50#	.125		
51# to 100#	.11		Base Plates
101# to 400#	.1025	25# to 400#	.0675
401# to 600#	.0925	401# to 800#	.065
601# up	.085	801# up	.0625

Bowls, Vacuum Pumps, and other specially cored or intricate jobs are advanced approximately 15%.

For special metal specifications add to the above base prices as follows:

"D" Meehanite	1c per lb.
"B" Meehanite	2c per lb.
"A" Meehanite	3c per lb.

On April 14, 1942 we received notification of a general price advance from the Crawford & Doherty Foundry Company which stated as follows:

"Effective April 14, 1942, all previously quoted prices on castings are hereby cancelled and the following schedule substituted therefor":

4-14-42

CAST IRON CASTINGS

Crawford & Doherty

1# to 50#	.14		
51# to 100#	.125		Base Plates
101# to 400#	.12	25# to 400#	.0775
401# to 600#	.11	401# to 800#	.075
601# up	.10	801# up	.0725

Bowls, Vacuum Pumps, Impellers and all intricate or specially cored castings priced at per each.

(Testimony of Glen Fox.)

Castings weighing under one pound each billed as one pound castings.

“D” Meehanite 1c per lb.

“B” Meehanite 2c per lb.

“A” Meehanite 3c per lb.

The prices on castings from the Crawford & Doherty Foundry Company that were quoted us on May 14, 1941 carried through without any changes whatever until April 14, 1942. The schedule of prices which became effective April 14, 1942 has carried through and has been the same up until the present time with but few exceptions. At the present time Crawford & Doherty Foundry Company is not accepting any business from on Standard items—CBA

us ^ and give as the reason that they are unable to make castings for us at the prices approved by the OPA. As of this date, we have not received the January invoices from Crawford & Doherty Foundry Company but have turned over to Glen E. Fox all of the invoices that we have received from Crawford & Doherty Foundry Company during the period from October 26, 1942 to January 1, 1943.

I, C. B. Amos, being first duly sworn, depose and say, that I have read the foregoing statement, that I know the contents thereof, and hereby make solemn oath that the same is true and correct; that I have freely and willingly given the foregoing statement and have no knowledge of any facts that

(Testimony of Glen Fox.)

alter, vary, or add thereto, with knowledge that said information may be used against me.

C. B. AMOS

(Signed)

Subscribed and sworn to before me this 1st day of Feb., 1943

GLEN E. FOX

Investigator, Office of Price
Administration

PLAINTIFF'S EXHIBIT No. 13

5-14-41

CAST IRON CASTINGS

Crawford & Doherty

1# to 50#	.125		
51# to 100#	.11		Base Plates
101# to 400#	.1025	25# to 400#	.0675
401# to 600#	.0925	401# to 800#	.065
601# up	.085	801# up	.0625

Bowls, Vacuum Pumps, and other specially cored or intricate jobs are advanced approximately 15%.

For special metal specifications add to the above base prices as follows:

"D" Meehanite	1c per lb.
"B" Meehanite	2c per lb.
"A" Meehanite	3c per lb.

4-14-42

CAST IRON CASTINGS

Crawford & Doherty

1# to 50#	.14		
51# to 100#	.125		Base Plates
101# to 400#	.12	25# to 400#	.0775
401# to 600#	.11	401# to 800#	.075
601# up	.10	801# up	.0725

(Testimony of Glen Fox.)

Bowls, Vacuum Pumps, Impellers and all intricate or specially cored castings priced at per each.

Castings weighing under one pound each billed as one pound castings.

"D" Meehanite	1c per lb.
"B" Meehanite	2c per lb.
"A" Meehanite	3c per lb.

PLAINTIFF'S EXHIBIT NO. 14

AFFIDAVIT

United States of America

District of Oregon—ss.

I, C. B. Amos, being first duly sworn depose and say as follows:

That I am the Purchasing Agent of the Bingham Pump Company of 705 S. E. Main Street, Portland, Oregon, and that as Purchasing Agent of the above Company I have full access to, and am thoroughly familiar with the bookkeeping system and general office methods used by the Bingham Pump Company; that as Purchasing Agent of the above Company I am charged with originating requisitions and for placing them with the different suppliers that furnish the Bingham Pump Company with materials. I am thoroughly familiar with each and every item that the Bingham Pump Company buys from the Crawford & Doherty Foundry Co. In my position I am charged with the responsibility of seeing that all prices are checked against original purchase orders.

(Testimony of Glen Fox.)

According to our records and the correspondence we have received from Crawford & Doherty Foundry Company, also from the invoices in our files which we have received from them, I find that during the period from August 1, 1941 to February 1, 1942, and also during the entire month of March 1942, the highest prices charged and paid for by us for castings from Crawford & Doherty Foundry Co. were quoted to us first on May 14, 1941 and were as follows:

5-14-41

CAST IRON CASTINGS

Crawford & Doherty

1# to 50#	.125		
51# to 100#	.11		Base Plates
101# to 400#	.1025	25# to 400#	.0675
401# to 600#	.0925	401# to 800#	.065
601# up	.085	801# up	.0625

Bowls, Vacuum Pumps, and other specially cored or intricate jobs are advanced approximately 15%.

For special metal specifications add to the above base prices as follows:

"D" Meehanite	1c per lb.
"B" Meehanite	2c per lb.
"A" Meehanite	3c per lb.

On April 14, 1942 we received notification of a general price advance from the Crawford & Doherty Foundry Co. as follows:

Effective April 14, 1942, all previously quoted

(Testimony of Glen Fox.)

prices on castings are hereby cancelled and the following schedule substituted therefor:

4-14-42

CAST IRON CASTINGS

Crawford & Doherty

1# to 50#	.14		
51# to 100#	.125		Base Plates
101# to 400#	.12	25# to 400#	.0775
401# to 600#	.11	401# to 800#	.075
601# up	.10	801# up	.0725

Bowls, Vacuum Pumps, Impellers and all intricate or specially cored castings priced at per each.

Castings weighing under one pound each billed as one pound castings.

"D" Meehanite	1c per lb.
"B" Meehanite	2c per lb.
"A" Meehanite	3c per lb.

The prices on castings from the Crawford & Doherty Foundry Co. that were quoted us on May 14, 1941 carried through without any changes whatever until April 14, 1942. The schedule of prices which became effective April 14, 1942 has carried through and has been the same up until the present time with but a few exceptions.

CLIFFORD B. AMOS

Subscribed and sworn to before me this 6th day of February, 1943.

(Seal) J. L. DAVIS

Notary Public for Oregon

My Commission Expires Feb. 10, 1945

(Testimony of Glen Fox.)

Mr. Wagner: You may cross-examine.

Mr. Henderson: No cross-examination.

Mr. Wagner: That is all, Mr. Fox.

(Witness excused)

W. B. PORTER

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. You are Mr. W. B. Porter?

A. Yes, sir.

Q. Where do you reside, Mr. Porter? [56]

A. Oswego.

Q. What is your present occupation?

A. Sales Engineer for Premier Gear & Machine Works.

Q. Prior to that occupation were you employed by the Willamette Iron & Steel Corporation?

A. Yes, sir.

Q. In what capacity?

A. Contract, engineer.

Q. When did your employment with the Willamette Iron & Steel Corporation commence?

A. February 9, 1940.

Q. In February of 1940? A. Yes.

Q. And what was your position? What were your duties at the outset of your employment there?

(Testimony of W. B. Porter.)

A. Engineer.

Q. Engineer. Did you have access to or supervision, or custody, of any of the records of the Willamette Iron & Steel Corporation?

A. Not at the beginning of my employment.

Q. Are you acquainted with Crawford & Doherty Foundry Company? A. Yes, sir.

Q. And Mr. Card? A. Yes.

Q. Of that company? A. Yes. [57]

Q. And now in connection with the custody of records during any time in your employment with the Willamette Iron & Steel Corporation did you have custody and supervision over the records of purchases of castings from Crawford & Doherty Company? A. Yes.

Q. And when did that commence, Mr. Porter?

A. Approximately November, 1941.

Q. Referring to Plaintiff's Exhibit 22 for identification, Mr. Porter, can you tell us whether or not the records that those are photostatic copies of were records that were records in your custody and under your control during your employment with Willamette Iron & Steel Corporation?

A. That is right.

Q. They were? A. Yes.

Q. And what are those records?

A. These are copies of purchase orders.

Q. Is there any reference made in those purchase orders to a contract, including the escalator clause, Plaintiff's Exhibit 26?

A. Purchase Order 11,111 makes a reference——

(Testimony of W. B. Porter.)

Q. Makes a reference to what?

A. To the conditions and agreements pertaining to our order 10594.

Q. And what does that mean?

A. That refers to the purchase agreement which was attached to [58] that order—a copy of which is attached.

Q. Then the subsequent purchase order that makes the reference was a purchase order issued pursuant to the original purchase order of June 25th; is that right?

A. That is correct. It was issued on October 25th.

Q. What about the next purchase order contained in this Plaintiff's Exhibit 22 for identification? Does that make any reference to the original purchase order?

A. Yes; Purchase Order No. 17911.

The Court: Date?

A. Dated December 3rd, 1941.

Mr. Wagner: Q. And what reference does it include?

A. It makes reference to paragraph 5 of the purchase agreement, reference to inspection.

Q. All right. How about the next purchase order? What is the number of it, Mr. Porter?

A. 12,826.

Q. And what is the date of it?

A. Dated December 30th, 1941.

Q. What reference, if any, is included in that to the original order of June 25th? A. None.

(Testimony of W. B. Porter.)

Q. Is there another purchase order?

A. Yes.

Q. Give the number of the next one. [59]

A. Purchase Order 12,827, also dated December 30th, 1941.

Q. Any reference to that?

A. It makes no reference to the original purchase order.

Q. It makes none? A. That is correct.

Q. Now Mr. Porter, will you explain to the Court just how those purchase orders are originated and what the nature of the transaction is that they are evidence of.

A. During the period in which these purchase orders originated there was a change in the method of handling. At the beginning the purchase orders were originated under the supervision of Mr. C. M. Sigle by Mr. G. K. Murdoch, Mr. C. H. Pape or Mr. C. J. Hesse, depending on the particular product being purchased. These purchase orders were signed by Mr. Sigle and were mailed out, and the later——

Q. Where would they be mailed to, Mr. Porter?

A. To the Foundry.

Q. That would in this case be——

A. In this case it would be Crawford & Doherty.

Q. Crawford & Doherty?

A. At a later date, approximately November or December of 1941, when my duties included the handling of these castings, requests to purchase were originated by myself and these requests were

(Testimony of W. B. Porter.)

checked and were written up in the purchase order form and mailed to the Foundry. [60]

Q. Now when you say requests for purchase orders were originated by yourself, now just what does that mean, and what took place around or just preceding and just after the issuance of such requests?

A. In order to make that clear I will have to state the change of the procedure in the organization. As I say, prior to that time Mr. Sigle signed purchase orders. Subsequent to that time the purchasing department handled the actual writing of a purchase order. I merely indicated the source and prices available and indicated——

Q. When you say purchase prices available, what do you mean by that, and where were the prices—where did they originate that were indicated as being available?

A. Prices taken from previous orders or from my own conversations with the Foundry. This was written up on what we call a request to purchase. This request to purchase was forwarded through the various departments, the departments handling controlled material, the cost accounting, to see that the job was correct, through an assistant manager and to the purchase department, where the final purchase order was written and signed by the purchase agent.

Q. Now what I am more particularly trying to arrive at is how, in these particular situations, Mr.

(Testimony of W. B. Porter.)

Porter, referring to Exhibit 22 for identification, how the prices that were included in those orders originated. How did it come about that these orders were written up, including those prices as there stated? [61]

A. Purchase order 11,111 was originated by Mr. Pape and undoubtedly carried a price which he negotiated with the Crawford & Doherty Foundry Company. I have no personal knowledge of that. Purchase order 17,911 was originated by Mr. Hesse, with whom I was working at that time. That order was written just prior to his leaving the company and my taking over his duties.

Q. My understanding then, Mr. Porter, is that these prices originated in either one of two manners: either by direct contact, either by telephone conversation or by personal conversation with the members of the firm of Crawford & Doherty Company, or, on the other hand, were taken from a previous purchase order—from previous purchase orders? Am I right in that?

A. That is correct. In case it was taken from a previous purchase order it was our custom to phone the Foundry and ask if they would be willing to accept another order for certain quantities at previous prices.

Q. And was that done in these instances?

A. I can't say whether it was or not. Those were handled by Mr. Hesse and not by myself.

Mr. Wagner: Hand the witness Plaintiff's Exhibit 19 for identification.

(Testimony of W. B. Porter.)

Q. Will you identify that document, Mr. Porter. What is that document?

A. This document was prepared by representatives of the Office [62] of Price Administration?

The Court: What number?

The Witness: Exhibit No. 19, your Honor.

Mr. Wagner: This Exhibit 19, your Honor, is the affidavit of Mr. Porter.

The Witness: And the information contained in it was obtained from my records, and that was signed by myself.

Q. The information obtained in there was obtained from records under your custody and control, of the Willamette Iron & Steel Corporation?

A. That is correct.

Q. And the prices that are indicated there as being the highest prices during this particular period, namely, August 1st, 1941, and August 1st, 1942, then, are, in fact, the highest prices that those records reveal; is that right—those original records of the Willamette Iron & Steel Corporation?

The Court: Is that question limited to Crawford & Doherty transactions?

Mr. Wagner: It is limited to Crawford & Doherty transactions.

A. Yes. My records indicated these prices covered between August 1st, '42, and February 1st, '43.

The Court: No. You have the years wrong, don't you?

Mr. Wagner: Q. What were the years, Mr. Porter? I didn't understand. [63]

(Testimony of W. B. Porter.)

A. August 1st, '42, and February 1st, 1943, are the figures given here.

Mr. Wagner: May I see the exhibit, please.

The Witness: It may be that it was misdated and I didn't catch it.

(Paper passed to Mr. Wagner)

The Witness: My recollection is that it was probably intended to date that the year previous.

Mr. Wagner: Give it back to the witness.

Q. What you are indicating then, by that statement there, is, Mr. Porter, that deliveries at those prices were made during those dates, unless those dates are in error?

A. The deliveries were undoubtedly made at these prices during the first—during the receiving of castings indicated on those purchase orders that I have referred to before. The dates of receiving them I think were a year previous to the ones indicated here.

Q. Then the dates as indicated there are in error by one year?

A. I believe that is probably true. I wouldn't wish to make a positive statement without checking the records.

Q. Handing you Plaintiff's Exhibit 18 for identification I ask you to read that. By comparing that with the previous exhibit numbered 19 and refreshing your memory therefrom, could you say whether or not those dates are in error?

A. The dates shown on Exhibit No. 18 would

(Testimony of W. B. Porter.)

seem to indicate [64] that the date shown on Exhibit 19 is in error.

Mr. Wagner: At this time we will offer the Exhibits 22, 19 and 18 for identification—renew our offer.

Mr. Henderson: If the Court please, I see no purpose in arguing it. He is offering an exhibit which is admitted as wrong, 19. I can't see how it can have any probative value. He admits it is wrong. He seems to be offering an exhibit, after the witness has explained it is not correct, and then offering the exhibit. I don't see the probative value of it.

Mr. Wagner: The witness, your Honor, has testified that it is an apparent typographical error.

The Court: Well, it all seems to me to be purely technical, where a witness uses a document to refresh his recollection, whether the exhibit is put in the case or not. The testimony is the testimony of the witness and not statements in the exhibit, but there being no jury here, why, we will let them come in, with the understanding they are not offered as substantive proof. The testimony is the testimony of the witness, given on the witness stand. They are admitted on that basis.

(The affidavit of W. B. Porter so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 19.)

(Testimony of W. B. Porter.)

PLAINTIFF'S EXHIBIT NO. 19

AFFIDAVIT

United States of America

District of Oregon—ss.

I, W. B. Porter, being first duly sworn depose and say as follows:

I am contract Engineer for the Willamette Iron and Steel Corporation. In this position I am charged with allocating requisitions for material. The purchase orders given to Crawford & Doherty Foundry Co. are originated by me and I have access to all of the records of the Willamette Iron and Steel Corporation relating to present and past purchases from Crawford & Doherty Foundry Co. According to these records the Willamette Iron and Steel Corporation gave Crawford & Doherty Foundry Co. their first contract for marine engine castings on June 25, 1941. This contract called for the following prices:

L. P. Piston Heads—at $7\frac{1}{2}c$

M. P. Cylinders—at $10\frac{1}{2}c$

Guide Brackets and Shaft Covers—8c

L. P. Piston Follower Rings—at $7\frac{1}{2}c$

H. P. Cylinder Liners—10c

H. P. Valve Liners—at 11c

Liners and Eccentric Straps and Crosshead Slippers—at 8c

L. P. Valve Bridals—at 7c

L. P. Stuffing Boxes—at $7\frac{1}{2}c$

(Testimony of W. B. Porter.)

The Crawford & Doherty Foundry Co. made deliveries to the Willamette Iron and Steel Corporation of the above castings at the above prices during the period from August 1, 1942 to February 1, 1943.

The above castings are marine engine castings.

W. B. PORTER

Subscribed and sworn to before me this 6th day of February, 1943.

(Seal)

J. L. DAVIS

Notary Public for Oregon

My Commsision Expires Feb. 10, 1945

Mr. Wagner: Mr. Henderson, is there any objection to the other two exhibits? [65]

Mr. Henderson: If I understood the Court correctly I have no objection. I understood him to say the testimony of the witness controlled.

Mr. Wagner: Very well.

(The affidavit of W. B. Porter, dated January 26th, 1943, so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 18; and the photostatic copies of purchase orders of Willamette Iron & Steel Corporation so offered and received, having been previously marked for identification, were marked received as Plaintiff's Exhibit 22.)

(Testimony of W. B. Porter.)

PLAINTIFF'S EXHIBIT NO. 18

I, W. B. Porter, of Willamette Iron & Steel Corporation, hereby represent and state to Glenn E. Fox, who is known to me as an investigator of the Office of Price Administration, as follows:

I am a contract Engineer for the Willamette Iron and Steel Corporation, and in this position I am charged with allocating Requisitions for material. The Purchase Orders that are given to Crawford and Doherty Foundry Company are originated by me, and I have access to all the records pertaining to these purchases. According to our records the Willamette Iron & Steel Corporation gave Crawford & Doherty Foundry Company their first order for Marine Engines castings, June 25, 1941. This order called for the following:

L. P. Piston Heads—at $7\frac{1}{2}c$

M. P. Cylinders—at $10\frac{1}{2}c$

Guide Brackets and Shaft Covers—at $8c$

L. P. Piston Follower Rings—at $7\frac{1}{2}c$

H. P. Cylinder Liners—at $10c$

H. P. Valve Liners—at $11c$

Liners and Eccentric Straps and Crosshead Slippers—at $8c$

$7c$ —W.B.P.

L. P. Valve Bridals—at \wedge

L. P. Stuffing Boxes—at $7\frac{1}{2}c$

The Crawford and Doherty Foundry Company maintained the exact prices as they appear above

(Testimony of W. B. Porter.)

from June, 1941 until September 30th, 1942, at which time they rebilled us for all castings they had

March—WBP

shipped us from ^ 17th to September 30th, 1942.

This rebilling amounted to \$9,206.90 and was allo-

27872—WBP

cated and was billed to us on their invoice ^ This

by—WBP

invoice was paid ^ us on November 24th, 1942 with \$2,270.99 being covered by check #E-63 and \$6,935.91 was covered by check #21468. Both of these checks were dated November 24th, 1942. There were no advances in Crawford & Doherty prices from August 1941 until February 1, 1942, and the only advance in prices that we have had from the Crawford and Doherty Foundry were spoken of above as becoming effective March 17th, 1942.

I, W. B. Porter, being first duly sworn, depose and say, that I have read the foregoing statement, that I know the contents thereof, and hereby make solemn oath that the same is true and correct; that I have freely and willingly given the foregoing statement and have no knowledge of any facts that alter, vary, or add thereto, with knowledge that said information may be used against me.

W. B. PORTER

Signed

(Testimony of W. B. Porter.)

Subscribed and sworn to before me this 26 day
of January 1943

GLEN E. FOX

Investigator, Office of Price
Administration

JACK L. DAVIS

PLAINTIFF'S EXHIBIT No. 22

PURCHASE ORDER

WILLAMETTE IRON AND STEEL CORPORATION
2860 N. W. Front Avenue
Portland, Oregon

To Crawford & Doherty
Foundry Company,
4604 S. E. 17th Avenue,
Portland, Oregon

Purchasing Order No. 11111

To be shown on all Invoices, Ship-
ping Papers, Packages, Etc.

Date Oct. 25, 1941

Terms: F.O.B. C&D Foundry Deliver to: Machine Shop
Ship via..... Date Wanted..... Render Invoice in 3

Transportation Charge must be prepaid. If quoted F.O.B. Shipping Point.
Attach Original Paid Freight Bill to Invoice

Item	Quantity	Unit	Description	Unit Price	Amount
	20 Only	H.P.	Cylinders Drwg. 593202— Pattern E-24555 .....	.101½ per lb.	

The above order subject to all conditions and agreements
appertaining to our order 10594—Jan. 25, 1941.

[In pencil] : (June)

For Company Use Only

Job Order No. 821-E

Department or Shop.....

WILLAMETTE IRON AND

Purpose for Which

STEEL CORPORATION

Ordered.....

By C. N. SIGLA

Originated by Pape

On Requisition No.....

For further information concerning this requisition,
contact Mr. G. K. Murdock

(Testimony of W. B. Porter.)

[Willamette Iron and Steel Corp. Purchasing Order Form]

To Crawford & Doherty

Purchase Order No. 17911

Foundry Company,

To be shown on all Invoices, Shipping Papers, Packages, etc.

4604 S. E. 17th Avenue

Portland, Oregon

Date 12-3 1941

Terms.....F.O.B. W.I.S.

Deliver to Mach Shop

Ship via..... Date Wanted: See letter Tender invoice in 5

Transportation Charges must be prepaid. If quoted F.O.B. Shipping Point,
Attach Original Paid Freight Bill to Invoice.

Item	Quantity	Unit	Description	Unit Price	Amount
			Castings and Patterns as per list:		
252	Only	Dwg. No. 8893-4			
		Patt. No. 24484 Eccentric Strap			
21	Only	Dwg. No. 18132-8			
		Patt. No. 24488 HP Valve Stem Guide Bracket			
21	Only	Dwg. No. 18142-8			
		Patt. No. 24542 HP Valve Chest Cover			
252	Only	Dwg. No. 18143-8			
		Patt. No. 24505 Liner for Eccentric Strap			
63	Only	Dwg. No. 18184-8			
		Patt. No. 24585 Crosshead Slipper			
21	Only	Dwg. No. 18243-8			
		Patt. No. 24673 MP Indicator Gear Sleeve			
21	Only	Dwg. No. 18244-8			
		Patt. No. 24674 HP Indicator Gear Sleeve			
21	Only	Dwg. No. 18268-8			
		Patt. No. 24701 Driving Head			
21	Only	Dwg. No. 18294-8			
		Patt. 24728 Drain Valve Offset			

Price .08 per lb.

Inspection: See Para. 5 of Purchase Agreement.

Delivery: See letter attached.

All material on this order is classified under A-1-b

Priority Form P-7 Copy No. 26.

For Company Use Only

WILLAMETTE IRON AND

Job Order No. 821-E

STEEL CORPORATION

Originated by Hesse

By C. L. BRAINERD

For further information concerning this requisition
contact Mr. E. B. Stiles

(Testimony of W. B. Porter.)

[Willamette Iron and Steel Corp. Purchasing Order Form]

To Crawford and Doherty

Purchase Order No. 12826

Company

To be shown on all Invoices, Shipping Papers, Packages, etc.

4604 S. E. 17th St.

City

Date 12/30/41

Terms.....F.O.B. Our Plant Deliver to Machine Shop

Ship via..... Date Wanted: As below Render Invoice in 5

Transportation Charges must be prepaid. If quoted F.O.B. Shipping Point,
Attach Original Paid Freight Bill to Invoice.

Item	Quantity	Unit	Description	Unit Price	Amount
------	----------	------	-------------	------------	--------

34 only L.P. Piston Bodies Dwg. 5929-2

Pattern #2451907½ per lb.

32 only L.P. Cylinder Covers Dwg. 8910-4

Pattern #e 24534..... .07½ per lb.

(1) casting only off each pattern shall be furnished with 15 days after receipt of patterns, thereafter (12) of each per month shall be delivered until the two orders are completed.

CONFIRMATION

All material on this order is classified under
A-1-b Priority Form P-7 Copy No. 101.

For Company Use Only

WILLAMETTE IRON AND

Job Order No. 821-E

STEEL CORPORATION

Originated by Hesse

By C. L. BRAINERD

For further information concerning this requisition
contact Mr. R. F. Spencer

(Testimony of W. B. Porter.)

[Willamette Iron and Steel Corp. Purchasing Order Form]

To Crawford and Doherty

Purchase Order No. 12827

Foundry Company

To be shown on all Invoices, Shipping Papers, Packages, etc.

4604 S. E. 17th St.

City

Date 12/30/41

Terms.....F.O.B. Our Plant Deliver to Machine Shop

Ship via..... Date Wanted: As below Render Invoice in 5

Transportation Charges must be prepaid. If quoted F.O.B. Shipping Point,
Attach Original Paid Freight Bill to Invoice.

Item	Quantity	Unit	Description	Unit Price	Amount
21 only	L.P. Piston Bodies Dwg. 5929-2				
	Pattern #E-24519 .....			.071½ per lb.	
21 only	L.P. Cylinder Covers Dwg. 8910-4				
	Pattern #3-24534 .....			.071½ per lb.	

These castings shall be furnished at the rate of
12 each per month consecutively to purchase
order No. 12826.

All material on this order is classified under
A-1-b Priority Form P-7 Copy No. 101.

Confirmation

For Company Use Only

WILLAMETTE IRON AND

Job Order 821-E

STEEL CORPORATION

Originated by Hesse

By C. L. BRAINERD

For further information concerning this requisition
contact Mr. R. F. Spencer

Q. Then referring now, Mr. Porter, to this affidavit, Plaintiff's Exhibit 19, according to the records of the Willamette Iron & Steel Corporation in connection with purchases from Crawford & Doherty Foundry Company during the period August 1st,

(Testimony of W. B. Porter.)

1941, to February 1st, 1942, low pressure piston heads were offered and delivered to Willamette Iron & Steel Corporation by the Crawford & Doherty Foundry Company at 7½ cents per pound, as indicated on your statement here; is that correct?

A. May I look at the purchase order exhibit, please, this one over here? That is correct, 7½ cents a pound.

Q. All right. Referring to your statement, Plaintiff's Exhibit 19 again, what is the next item and price at which sales were [66] made?

A. Medium pressure cylinders at 10½ cents a pound. Guide brackets and shaft covers, 8 cents. Low pressure piston follower rings 7½ cents. High pressure——

The Court: You don't need to put that detail in the record, do you?

Mr. Wagner: I was only trying to satisfy Mr. Henderson's objection to the effect that it was the witness' testimony and not the exhibit that was controlling.

The Court: Well, I don't want to interfere, if he wants it. I would not want you to put people on here to relate all these things that are in this bill of particulars. I want to get out of here today or tomorrow, in other words.

Mr. Wagner: These are in connection with ceiling prices, base period prices, which Mr. Henderson does not concede.

The Court: These go to the Willamette Iron & Steel?

(Testimony of W. B. Porter.)

Mr. Wagner: No—yes, these do, too, your Honor.

The Court: How many items are there?

Mr. Wagner: Not very many.

The Court: All right.

Mr. Wagner: Go right ahead.

The Witness: The items listed here, high pressure cylinder liners 10 cents; high pressure valve liners, 11 cents; liners and eccentric straps and crosshead slippers, 8 cents; low pressure valve bridles, 7 cents; low pressure stuffing boxes, [67] 7½ cents.

Q. Now referring again to Plaintiff's Exhibit 22, the photostats, will you indicate to us what the prices were for the items delivered during that period of time that are included on the photostats.

A. The prices indicated on the purchase orders are as shown on the Exhibit No. 19, but the purchase order does not necessarily indicate a delivery within a certain time period. It contains a request for delivery during that period.

Q. Now referring to Exhibit No. 19, is there anything that indicates to you that an examination had been made by yourself to see whether or not deliveries had been made at those prices you have been reading from there? A. Yes.

Q. Yes.

A. It would indicate that deliveries had been made during this period; not necessarily the complete amount shown on the purchase order.

(Testimony of W. B. Porter.)

Q. Are there any items included on the purchase orders, referring to Plaintiff's Exhibit 22, that are not covered by your statement, Plaintiff's Exhibit 19? A. Yes, there are other items.

Q. Will you read those and the prices.

A. It is a matter of checking them off.

Mr. Henderson: If the Court please, if I am responsible for [68] this in any way I want to absolve myself from it. I didn't intend to make any kind of an objection that would provoke counsel to ask the witness to interpret documents. They are supposed to speak for themselves. I just don't want to be responsible for it.

Mr. Wagner: Very well. If counsel is willing to accept that we will withdraw the question.

Q. Mr. Porter, what was the nature of these castings that were being furnished by the Crawford & Doherty Foundry Company? What were they being used for? And can you describe them, generally speaking?

A. They were parts for marine engines for Liberty Ships.

Q. Can you describe the castings to us? Were they large in size, or some large and some small?

A. They varied greatly in size. The medium pressure cylinder casting, if I remember correctly, weighed about 1600 pounds; drain valve offset possibly weighing four or five pounds.

Q. Were any of these castings—are you acquainted with Iron Fireman Manufacturing Company and their officers? A. Yes, sir.

(Testimony of W. B. Porter.)

Q. Are you acquainted with Mr. Bates?

A. Yes.

Q. During this period of time, Mr. Porter, were the Iron Fireman Manufacturing Company, to your knowledge, making the same kind of engines? [69]

A. The Iron Fireman Manufacturing Company industrial division entered into the manufacture of the same engine subsequent to the start of my activity in connection with this engine. I don't know——

Q. You don't know approximately when?

A. I don't know the date. I don't recall the date.

Q. Were these parts that the Willamette Iron & Steel were using and the Iron Fireman Manufacturing Company were using, interchangeable?

A. Yes.

Q. Were any interchanges made between your concern, the Willamette Iron & Steel Corporation, and the Iron Fireman Manufacturing Company, to your recollection?

A. They were later on in the program.

Q. Do you have an idea approximately what volume of these castings was being used by Willamette Iron & Steel Corporation during any given period, on an average?

A. I could not answer that question directly. The figures—the information available on the purchase orders here does not show.

Mr. Wagner: You may cross-examine.

Mr. Henderson: No cross-examination.

(Witness excused)

Mr. Wagner: Will you take the witness stand, please, [70] Mr. Bates.

HOWARD W. BATES

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. Will you state your name, please.

A. Howard W. Bates.

Q. What is your occupation, Mr. Bates?

A. Plant Superintendent.

Q. Oh What?

A. Of Iron Fireman Manufacturing Company.

Q. And how long have you been so occupied?

A. Well, we organized that plant. I entered the employ up there February 15th, 1942. That is when we organized the plant.

Q. Are you familiar with their operations during the period August 1st, 1941, down to the present time?

A. Well, Iron Fireman has an engine plant. We were not in existence in 1941.

Q. You were not?

A. No. That plant was organized in 1942.

Q. About when in 1942, do you remember?

A. Well, February 15. Well, to be exact, I went up there to go to work February 14th, 1942. [71]

(Testimony of Howard W. Bates.)

Q. And that was the industrial plant, which is over here on——

A. Yes, that is the industrial plant on the West Side.

Q. On the West Side; the one that burned down?

A. Yes, that is right.

Q. I hand you Plaintiff's Exhibit 23 for identification, Mr. Bates. Is that statement signed by yourself?

A. Yes, sir.

Q. And have you, since being in the court room, read that and refreshed your memory from it?

A. Yes. I remember it pretty generally now.

Q. And can you describe briefly what the contents of this statement are? Tell us briefly about what they are.

A. Well, this refers largely to two purchase orders that we issued up there to the Crawford and Doherty Company, under our numbers 0041 and 0042, covering certain castings, cylinders, bridles, and other castings, three price segregations.

Q. Three price segregations?

A. Yes.

Q. And those are included in that statement?

A. They are, yes.

Q. What are the price segregations?

A. In detail, twelve cents for M. P. Cylinders, bridles \$8.00, or 8 cents per hundred weight, and other castings \$8.50 per hundred weight, or 8½ cents a pound. [72]

Q. Handing you Plaintiff's Exhibit 24 for identification, will you describe that document briefly for us.

(Testimony of Howard W. Bates.)

A. Well, this touches upon the same orders, the same order numbers, and it states the details of the negotiations, when they were started, at February 19th, and these orders were issued March 9th. On some of the orders that we got out there were some temporary orders written up. Now I don't remember whether these 0041 and 0042 were the final typewritten orders or whether they were some originally penciled orders. On some I remember that Crawford and Doherty—I don't know just how that was handled, but on some of the others I didn't have at the time I went up there any office staff, stenographers, or any other thing and I know some of the orders I wrote out in longhand. Whether these were in longhand or whether they were subsequent orders I don't know. That might even have been signed by Carl Hesse there; I don't know. He entered into the picture but I don't remember the dates.

Q. At any rate, those indicate the original orders Iron Fireman had issued for this particular type of castings; is that right? A. Yes.

Q. And to your knowledge you state as a fact that prior to the month or the date February 14th in 1942, no deliveries of this type of castings were made to the Iron Fireman Manufacturing Company?

A. No, no; there were no orders delivered.

Mr. Wagner: You may cross-examine. [73]

Mr. Henderson: May I see those exhibits?

(Testimony of Howard W. Bates.)

Mr. Wagner: Pardon me. We will offer the Exhibits now, your Honor—renew our offer.

The Court: They are admitted on the same basis as the other similar exhibits.

(The affidavit of H. W. Bates dated January 29, 1943, so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 23; and the statement of H. W. Bates, dated October 16, 1942, so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 24.)

PLAINTIFF'S EXHIBIT NO. 23

I, H. W. Bates of Iron Fireman Mfg. Co. hereby represent and state to Glen E. Fox and Jack L. Davis, who is known to me as an investigator of the Office of Price Administration, as follows: I am plant Supt. of the Iron Fireman Mfg. Co., 1870 S. W. Front Ave., Portland, Oregon. As Superintendent I am charged with originating buying orders, and all purchasing, & negotiating of Contracts are my responsibility. This plant has been operating since February 1942, and on February 19, 1942, we started negotiations for Marine Engine Casting with the Crawford-Doherty Foundry Co, and on March 9, 1942 we sent the Crawford-Doherty Co Contracts #10041 and #10042 Covering our requirements for marine engine Castings. The Prices on the Contracts were as follows: M. P. Cylinders, gears \$12.00 cwt. Bridles \$8.00 per cwt.

(Testimony of Howard W. Bates.)

All other Casting \$8.50 per cwt. According to our invoices from Crawford-Doherty Foundry Co., there have been no changes in prices since the first Contracts were made in March 1942.

Our Records disclose that we have paid the above prices for Castings, from Crawford Doherty Foundry Co., from March 27, 1942 (this is the first delivery date) up until the present time. Invoices from Crawford-Doherty Foundry Co. have been loaned to, Glen E. Fox, these invoices are dated Oct 26, 1942 until January 1, 1943. The above invoices have been returned to me as of this date, and I hereby acknowledge receipt of same.

I, H. W. Bates, being first duly sworn, depose and say, that I have read the foregoing statement, that I know the contents thereof, and hereby make solemn oath that the same is true and correct; that I have freely and willingly given the foregoing statement and have no knowledge of any facts that alter, vary, or add thereto, with knowledge that said information may be used against me.

H. W. BATES

Signed

Subscribed and sworn to before me this 29 day of January 1943.

GLEN E. FOX

& JACK L. DAVIS

Investigators, Office of Price
Administration

(Testimony of Howard W. Bates.)

PLAINTIFF'S EXHIBIT NO. 24

I, H. W. Bates of the Iron Fireman Mfg Co, located at 1870 S W Front Ave. do hereby certify to the Office of Price Administration, an agency of the United States Government, that I am plant Supt. and have full charge of all the purchasing and the stores departments, and in this position I am called upon to check all purchases and enter into Contracts with our Suppliers—On Feby 19, 1942 we started negotiations with the Crawford Doherty Foundry Co—and on March 9, 1942 we sent them Contracts #10042 and 10041—on these Contracts the prices quoted are M P Cylinders 12.00 per cwt. Bridles 8.00 per cwt & all other Castings 8.50 per cwt. The first delivery on these Contracts was made March 27, 1942. In checking all invoices subsequent to March 27, 1942 I find that on no shipment has the Crawford Doherty Foundry Co. advanced the prices over what was quoted on Contracts #10042 & 10041.

I have read the above statement and believe it to be true and accurate to the best of my knowledge and belief and I have made the above statement freely and willingly.

Dated this 16 day of October, 1942

Witness

GLEN E. FOX

H. W. BATES

Signed

(Testimony of Howard W. Bates.)

Mr. Henderson: No cross-examination.

(Witness excused)

Mr. Wagner: Call Mr. MacKenzie.

The Clerk: Will you state your name, please.

Mr. MacKenzie: William J. MacKenzie.

WILLIAM J. MacKENZIE

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner: [74]

Q. Mr. MacKenzie, what is your occupation?

A. I am the Manager of the Tuerck MacKenzie Company.

Q. And how long have you been so occupied, Mr. MacKenzie? A. Since 1918.

Q. What does Tuerck MacKenzie Company do?

A. A great bulk of our business is manufacture of concrete pipe and products machinery.

Q. Machinery? A. Yes.

Q. Do you make any pipe at all?

A. No concrete pipe, no.

Q. You make the machinery to make the pipe with? A. That is right.

Q. Does Tuerck MacKenzie Company do business with the Crawford and Doherty Foundry Company? A. Yes, for years.

(Testimony of William MacKenzie.)

Q. For about how long?

A. Somewhere back in the '20's, something over twenty years.

Q. Something over twenty years. And offhand approximately, if you can say, Mr. MacKenzie, what is the volume of business that Tuerck MacKenzie Company does with Crawford and Doherty Company on any given period of time, say for a month or per year?

A. Well, for some years they ran nearly \$50,000.00; then when times were bad, like in the '30's, I imagine it was down to just a few thousand dollars, because the volume was down. It would [75] run up and down, but somewhere between twenty-five to forty-five or fifty thousand dollars a year.

Q. That would be for years, say, 1939, '40 and '41?

A. Yes; that is fairly representative all along. I am not sure about '39 but '40, '41 and '42 our volume was pretty well up.

Q. How about '43 and '44?

A. They have held up about the same. That answer would apply pretty well to them.

Q. Now Mr. MacKenzie, can you describe to the Court just what these castings that are purchased from the Crawford & Doherty Company are like as to size and shape?

A. Well, they run all the way from little fine castings, weighing, oh, as low as a pound, and a

(Testimony of William MacKenzie.)

half apiece, up to, oh, pieces as high as 2200, 2500 pounds—the whole range.

Q. Now referring to the little castings, the pound castings, what would they be most apt to be used for?

A. Well, those were just small machine parts, and possibly for the manufacture of the equipment to make the smaller diameters of pipes. For instance, the castings to make a 3-inch pipe would be a great deal lighter and smaller than the castings possibly to make a 42-inch pipe or 48-inch pipe, and the same would be true of the pipe machine. The smaller pipe machine parts were smaller and lighter than the larger pipe machines.

Q. Could you give us an idea of what percentage of the total number of castings used in manufacturing these machines would [76] be in the one-pound type, or, on the other hand, in the larger type?

A. I don't think I could, because our arrangement through the years was different, because when we wanted different qualities of iron for different things, so the weight didn't altogether determine the pricing schedule that existed between us and Crawford & Doherty. It was for the use to which the casting was to be put that determined it.

Q. The use to which the casting was to be put that determined the price? A. Yes, sir.

Q. And did those prices fluctuate and change very much during all of this period of time?

A. Through the years?

(Testimony of William MacKenzie.)

Q. Yes; or did they remain pretty constant?

A. Not materially. We had a very satisfactory arrangement and as materials increased in price, or labor, we would be notified some time in advance as to a raise in the prices, and through all the years there wasn't any great fluctuation in prices, because they knew that we wanted to try to maintain, as much as possible, a constant price policy out to our customers and they worked with us a good deal on that basis. They weren't changing with every—prices didn't change with every small fluctuation in the price of scrap iron and coke, or anything like that.

Q. There were a number of changes—do you recall one during [77] the month of April, 1942?

A. Yes. There was a change some weeks after the price freeze.

Q. And in connection with that particular price change to your concern, Mr. MacKenzie, did your concern have occasion to make application to the Office of Price Administration for an increase of its price structure?

A. Yes. I went down and asked if we could pass on this increase and I was told that we couldn't. In fact, I was told that the Foundry couldn't make the increase.

Q. Do you remember about when that occurred?

A. Sometime I would say possibly within sixty or ninety days of when that April notice came, and the reason for that delay in there was that increase didn't affect the parts that were coming

(Testimony of William MacKenzie.)

through the Foundry at that time. The orders that were in the Foundry came through at the old price and there was a matter of sixty or ninety days delivery in there.

Mr. Wagner: You may cross-examine.

Mr. Henderson: No cross-examination.

(Witness excused)

Mr. Wagner: Mr. Amos. May I ask, your Honor, the Clerk whether there are any of the exhibits now that haven't been received in evidence? My recollection is they are all in now.

The Clerk: Were 23 and 24 received while I was out?

Mr. Wagner: Yes. [78]

The Clerk: Then they are all in.

CLIFFORD B. AMOS

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. You are Mr. Clifford B. Amos?

A. I am.

Q. What is your occupation, Mr. Amos?

A. Purchasing agent.

Q. For whom?

A. Bingham Pump Company.

(Testimony of Clifford B. Amos.)

Q. And where is the Bingham Pump Company located?

A. 705 Southeast Main Street, Portland.

Q. And how long have you been so employed, Mr. Amos?

A. In my present capacity?

Q. Yes.

A. Since 1933.

Q. What is your present capacity?

A. Purchasing agent.

Q. Are you acquainted with Crawford and Doherty Foundry Company?

A. Yes, sir.

Q. Mr. Card and Mr. Stirnweis?

A. Yes.

[79]

Q. Crawford and Doherty Foundry Company supply castings to the Bingham Pump Company; is that right?

A. They do.

Q. For how long have they been so supplying castings?

A. Since I believe 1935.

Q. Since 1935. You tell us, Mr. Amos, approximately what the volume of business is that has been carried on in that period of time between the two companies?

A. Yearly?

Q. Anything—monthly, yearly, or semi-annually, or just approximately what you can say about that.

A. Well, it was very small, of course, to begin with. Whatever I would say would be a guess at the present time. It possibly ranges between two and five thousand dollars per month.

Q. Between two and five thousand dollars a month?

A. That is a guess.

Q. And would you say that that prevailed during the period 1941, '42 and '43?

A. I would.

(Testimony of Clifford B. Amos.)

Q. What does the Bingham Pump Company do?

A. Manufactures pumps.

Q. Manufactures pumps. And you use the castings obtained from Crawford and Doherty Foundry Company in the manufacture of these pumps, do you? [80]

A. We do.

Q. Can you explain to us, Mr. Amos, just what the nature of these castings is? Describe them to us as to shape, weight, size.

A. Oh, they vary in weight from half a pound to—we have had castings as high as 7,000 pounds.

Q. 7,000 pounds. What would be the average or the larger volume of the castings?

A. Well, of the larger volume?

Q. Yes. What size would they range?

A. Of course that depends upon the nature of our business at the time, but possibly the larger volume is in a class between 100 and 400 pounds.

Q. 100 to 400 pounds?

A. Something like that.

Q. Does Bingham Pump manufacture all types of pumps, high pressure and low pressure.

A. Well, they manufacture most types of industrial pumping equipment.

Q. And you do it on order, do you?

A. Yes, sir.

Q. Does Crawford and Doherty Company supply all of your castings for all of your pumps?

A. At the present time, no, sir.

Q. At the present time they are not?

A. No, sir. [81]

(Testimony of Clifford B. Amos.)

Q. Did you during 1941 and '42?

A. They never supplied all of our castings.

Q. They never have. They have only been one of your suppliers?

A. That is true.

Q. Do you recall, Mr. Amos, of the fact that during April, 1942, the Crawford and Doherty Foundry Company raised its prices to you?

A. Yes, sir.

Q. And were those raised prices maintained throughout any extensive period?

A. Yes. As far as I can recall they are still in effect.

Q. Still in effect. Have there been any further raises, subsequent ones?

A. I am not sure, but I believe not.

Mr. Wagner: You may cross-examine.

Mr. Henderson: No cross-examination.

(Witness excused.)

Mr. Wagner: Now there is one other matter at issue, your Honor; it has been raised as an affirmative defense; and that is the——

The Court: Do you want to keep those men back there?

Mr. Wagner: No, we are through with them now. Thank you very much for coming in, gentlemen. [82]

It is the third affirmative defense and it raises the question of the authority of the attorneys to institute this action in this particular case—and I

would like to be sworn, if counsel wishes to put me on proof of this—Mr. McTernan, who was then the Regional Attorney in San Francisco of the Office of Price Administration, expressly, while here in Portland, directed the institution of this action. Now in that manner there is a differentiation between this and previous cases. Other than that the situation is the same. The same general order of delegation to him controls there, as far as the question of the delegation of authority is concerned, pertaining to this case.

Now if counsel desires to put me on proof of that I will be very glad to be sworn. If not, if counsel desires to stipulate that is the fact, why, that is the fact.

Mr. Henderson: Well, I think your statement is a little bit broad to expect me to stipulate to it. You are suggesting that I enter into a stipulation as to some things that amount to conclusions.

The Court: It is a matter of defense. You don't need to carry it any further, unless you want to. It has been pleaded as a defense. It is a matter of defense.

Mr. Wagner: Well, it is a matter of defense, as far as Mr. Henderson is concerned.

The Court: Well, is your case finished? [83]

Mr. Wagner: That is the only other issue in the case, your Honor. Yes, as far as our case is concerned.

The Court: That is an issue made in defense.

Mr. Wagner: Yes.

The Court: You rest, I believe?

Mr. Wagner: That is right, your Honor.

The Court: Go ahead, Mr. Henderson and Mr. Randall.

Mr. Henderson: If it please the Court, at this time I ask for a dismissal of this case, upon the grounds that the plaintiff has shown no right to the relief asked for, either on the facts or the law.

Now to elaborate that just a little bit, the first point is there has been no showing here, factual showing, as to what the next month's prices for gray iron castings was during the month of March, 1942, nor during the period from August 1st, 1941, to February 1st, 1942. There was a showing as to what prices, maximum prices, were charged to particular firms during those particular times, but there is no showing on the part of the Government that there were not higher prices charged to some one else.

They had alleged in their complaint, and the law requires them to allege and to show that we have violated the Maximum Price schedule.

Now the first one, the one that refers to the period, the month of March, reads: [84]

"No person shall sell or deliver any commodity, and no person shall sell or supply any services, at a price higher than the maximum price permitted by this Regulation". And "Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be: In those cases in which the seller dealt in the same or similar commodities or services, during March, 1942;

“The highest price charged by the seller during such month——

“For the same commodity or service.”

There is an explanation that says, “No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price.”

Then: “The ‘highest price charged’ shall be a price charged during March, 1942, to a purchaser of the same class.”

A purchaser of the same class is defined: “‘Purchaser of the same class’ refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for example”——this is what they mean——“(for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual customer)”——those are the examples——“or for purchasers located in different areas or for different quantities or grades or under different conditions of sale”. [85]

Now for the period of time: Under 244 it says, “On and after October 26, 1942, regardless of any contract, agreement, lease, or other obligation, no person shall sell or deliver gray iron castings, and no person shall buy or receive gray iron castings in the course of trade or business, at prices higher than the maximum price set forth in Appendix A hereof.”

Appendix A reads: “Maximum prices for gray iron castings. Castings substantially the same as

those which the seller sold or offered for sale at any time during the period from August 1, 1944, to February 1, 1942, inclusive. The maximum price for each such casting shall be the highest net price (after adjustment for all applicable customary charges, discounts, quantity differentials and other allowances in effect for the seller between August 1, 1941, and February 1, 1942) at which the seller sold or offered for sale such castings to a purchaser of the same class during the period from August 1, 1941, to February 1, 1942, inclusive.”

Now we are back to the purchaser of the same class, with the same definition:

“‘Purchaser of the same class’ refers to the practice adopted by the seller in setting different prices for gray iron castings during the period from August 1, 1941, to February 1, 1942, for sales to different purchasers or kinds of purchasers (for example, wholesaler, jobber, retailer, government agency, public institution, individual consumer) [86] or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.”

Now they have offered no proof whatsoever, and this is the matter that your Honor will recall I drew to the Court’s attention and to their attention at the pre-trial conference, which took place two weeks ago—they have not shown what was the highest price charged for castings within these definitions during these periods of time. They have shown that the highest prices to particular people were a certain amount but they have not shown yet, so

that the Court can say, so that the Court can make a finding, what the highest prices were for those particular periods.

Now the second point of this is, they have alleged, "In the judgment of the Administrator, the defendant has engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act", and so forth, "in that the defendant has violated the General Maximum Price Regulation". Then that is repeated in the third cause of action.

Now we have denied that, putting upon them the burden of showing that this is true. The Administrator has to prove what is alleged, and he is the man bringing this action. Giving full force and effect to what counsel has said, although it is a statement and I would not ask him to swear to what he says, [87] giving full force and effect to what he said, it still does not answer the question that the Administrator has concluded these particular things and he is bringing this action. You have to assume merely because there are appended to the complaint the signatures of four people, without even a designation, in my complaint, as to who they are, without even purporting to show on the face of this. We know who they are, of course, but I am saying the pleading that is filed does not even purport to show on its face that these people who signed it were attorneys for the Office of Price Administration.

Now I don't intend to argue it but I am calling attention to the fact that they are asking for treble

damages. They are asking for the imposition of a penalty upon this defendant and we are entitled to have these things established to the Court, I should think, before we are required to offer any proof in this matter.

The Court: I will reserve decision, Mr. Henderson, on all points.

Mr. Wagner: If the Court please, I would like to correct one matter that Mr. Henderson included as a part of the Regulation. Appendix A of Maximum Price Regulation 244 provides:

“The maximum price for each such casting shall be the highest net price at which the seller sold or offered for sale such casting to a purchaser of the same class during the period from August 1, 1941, to February 1, 1942, inclusive”; adding, [88] “provided, that if the seller sold or offered for sale such casting during such period to a specified purchaser, he may not exceed the highest selling or offering price to such purchaser on sales or deliveries to such purchaser.”

I wanted to add the provision there, because I think it clarifies the point.

Mr. Henderson: I apologize to the Court for not reading that. That is in there. I didn't intend to mislead the Court on that. Mr. Stirnweis.

DEFENDANT'S EVIDENCE

V. O. STIRNWEIS

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Henderson:

Q. Now will you please state your name.

A. V. O. Stirnweis.

Q. What is your business, Mr. Stirnweis?

A. Manager of Crawford & Doherty Foundry.

Q. And how long have you been associated with Crawford & Doherty? A. November, 1916.

Q. In what capacity did you go with them at that time? A. As co-owner.

Q. Co-owner? [89]

A. And secretary-treasurer.

Q. Mr. Stirnweis, how long have you been in the foundry business?

A. Since 1910. That is, in the business; not as an owner before 1916.

Q. You were working then? A. Yes.

Q. For whom?

A. Hesse-Martin Iron Works, from 1910 to '15.

Q. And since 1910 practically all the time you have been in this business? A. Yes.

Q. Has that been in the City of Portland all the time? You have been in the City of Portland all the time that you have been in the business?

A. Yes, sir, all the time.

(Testimony of V. O. Stirnweis.)

Q. And what is the nature of the castings manufactured by Crawford & Doherty at the present time?

A. Well, it is all, practically all light machinery castings, what we term light, medium and heavy machinery, gray iron castings and really termed Meehanite castings, which comes under that heading.

Q. What is Meehanite?

A. That is a process that has been developed in the last recent years. We have had it for seven years.

Q. It is a trade name for a particular type of metal; is that it? [90]

A. Yes.

Q. Different grades, are there, of Meehanite?

A. Yes.

Mr. Wagner: I am going to object to the questions. They are too leading. I think the witness ought to be doing the testifying.

Mr. Henderson: That is only preliminary. I will be glad to comply with that, though.

Q. How many different kinds of Meehanite are there, if there are different kinds?

A. Well, there are a half dozen grades of general engineering Meehanite, but there is no limit to special grades for services and purposes.

Q. Where is it manufactured?

A. Where is the metal manufactured?

Q. Yes. A. We have manufactured it.

Q. You mean you manufacture Meehanite itself?

(Testimony of V. O. Stirnweis.)

A. Yes. We don't buy any special metal. It is a process.

Q. It is a process? A. Yes.

Q. What size castings to you manufacture?

A. Well, the only limit on the size is the capacity of the crane.

Q. That at the present time is what? [91]

A. Three 20-ton cranes and miscellaneous others.

Q. What is the smallest casting you manufacture?

A. As small as you can find them in sand; I suppose maybe an ounce or two. Of course, that is a little bit extreme but we occasionally do.

Q. Real small? A. Yes.

Q. And, Mr. Stirnweis, what is the procedure that you follow in making the casting? What is brought to you first to determine what you are to manufacture? That is, how do you get your idea as to what you are going to manufacture?

A. Either the pattern, or drawings, or a sample casting.

Q. A sample casting. Blueprint drawing?

A. Or a pattern.

Q. Or a what? A. Or a pattern.

Q. Pattern? A. Ready for use, yes.

Q. And then when do you fix the price of your castings to your customer?

A. They are generally fixed before we accept the order. However, we have many accounts that do not ask for a price on the pattern casting.

(Testimony of V. O. Stirnweis.)

Q. Let me put it this way. You get a pattern or a blueprint, and when you get a pattern or a blueprint how do you determine [92] then the price of that casting? A. The price?

Q. Yes.

A. Well, we estimate the amount of metal and the amount of labor involved and base it on what the production per man hour is expected to be, less possible losses on account of different variables that enter into the making of the casting.

Q. What are the variables that enter into the making of castings?

A. Well, there are castings and castings, you know. For instance, you make cast iron brick or——

Q. Cast iron brick? A. Yes. .

Q. Just a solid square rectangular object?

A. Yes.

Q. That would be the smallest kind of a casting, wouldn't it?

A. Yes, sir. Or a high pressure multi-stage pump, which might involve 100 hours in labor against very few pounds of iron.

Q. What about the castings where there is a hollow part to it?

A. Well, as a rule, if it is enclosed with what is known as a water gadget, or something like that, it presents more hazards, and the more complicated the interior is in the general design of course the more hazards.

(Testimony of V. O. Stirnweis.)

Q. Now in fixing your price of castings to your various customers, do you take into consideration the same variables in arriving at the price? [93]

A. Yes; on the same general line of work we would. We would expect the same amount of defects, or foundry scrap on the average.

Q. The particular use to which the customer is going to put the article has nothing to do with it, as far as you are concerned, has it?

A. As far as price, no.

Q. And that was fixed entirely by what?

A. By the labor involved, and many times by the service requirements which we have to meet or else the blame is on us for not doing the job.

Q. Now there has been testimony here in respect to four different companies, Iron Fireman, Willamette Iron & Steel, Bingham Pump Company, and Tuerck MacKenzie. In fixing the prices for those castings sold to those companies, were they all arrived at in the same way by you? A. Yes.

Mr. Henderson: Now may I have Exhibits 3, 4 and 5, please, and 11 also, handed to the witness; and also 13, please.

Q. Mr. Stirnweis, that Exhibit 13 that you have there, the first one, it has been testified to as cards from files of the Bingham Pump Company and claimed to be a price list furnished by your company to Bingham Pump Company. Do you recognize that as such?

A. Yes. I am sure that is a copy of our—— [94]

(Testimony of V. O. Stirnweis.)

Q. Now the other letter, what is the number of that other one there? A. This one?

Q. No; the other one. A. Oh. 3.

Q. That is a letter covering prices to Tuerck MacKenzie; is that correct?

A. Yes; that is right.

Q. Mr. Stirnweis, those prices don't seem to be worded the same. They don't seem to be the same thing. The quotation isn't the same. What is the reason for that?

A. The quotation? You mean instead of——

Q. The way the prices are listed there.

A. Oh, instead of having from 1 to 50 pounds?

Q. Yes.

A. Well, it has been customary ever since we have done business with both of these people that they have a setup similar to that. They just get in the habit of buying their materials that way and they don't want to wave out of that. MacKenzie don't want to wave, whether he is buying a casting weighing 5 pounds or 500 pounds. He knows what the pound price is on the general run of the work. And Bingham is very much concerned about a casting being——

Q. Now Mr. Stirnweis, would it be possible for you to produce casting identical in all respects so it would be interchangeable [95] and give a price on it on those two different schedules that you have? That is, supposing Tuerck MacKenzie wanted a particular item and Bingham Pump Company wanted an identical item. A. Yes.

(Testimony of V. O. Stirnweis.)

Q. How would you arrive at the price? Would the price be the same on that list that you have there?

A. Well, understandg this: These prices are set up on their average requirements of their work. However, I don't quite understand how you mean.

Q. Well, Mr. Stirnweis, the fact that they are set up that way, would your price for the particular item ultimately be the same to Bingham Pump Company that it would to Teurck MacKenzie, if it was for the same identical item?

A. If it happened to fall in a certain range there as to weight. Otherwise it would be almost impossible, unless it was a separate job that didn't concern other business.

Q. Now then, these four people that have been mentioned, do you have a different way of arriving at or quoting the prices to them for their different items, just the same as you have a different way for Tuerck MacKenzie and Bingham Pump?

A. No, not particularly, except larger and heavier. What we call "Junkey" castings as a rule take a lower rate.

Q. Ultimately then do you have the same price for all of these different concerns, although the schedule is made up different?

A. Yes. I think over a period of time there would be a very, [96] very small fraction of a difference in the price of even these two customers per pound.

(Testimony of V. O. Stirnweis.)

Q. Put it this way: Is it your intention—was it your intention to charge both of these people the same for the amount of labor and the amount of metal used? A. Right. Sure.

Q. Is that also true of what you charged the Iron Fireman and Willamette Iron & Steel? Is that correct? A. Yes.

Q. Mr. Stirnweis, you remember you shake your head. The Court Reporter doesn't get that, so say either "Yes" or "No".

The Witness: Thank you.

Q. Now the labor that you use at your foundry, is that contracted for from month to month, or are you under a collective bargaining arrangement?

Mr. Wagner: We wish to object to the introduction of any evidence in this controversy pertaining to labor or costs, upon the ground and for the reason that the same is irrelevant; and on the further ground that the irrelevancy as to Crawford & Doherty's cost of labor to their pricing structure has already been determined by the Emergency Court of Appeals.

Mr. Henderson: If the Court please, if I am expected to answer that, counsel has misapprehended my intention for developing this line of inquiry. I am not trying to readjudicate in this Court the question that was litigated in the Emergency [97] Court of Appeals. I am trying to get at the price—what it was that fixed our price in January, we will say, of 1942, that is to February 1st, 1942. We are going to show all of our prices

(Testimony of V. O. Stirnweis.)

were fixed on that basis, and that there were certain schedules of prices furnished other concerns and any advances over those were based on the fact that our labor was about to be increased.

The Court: What is your defense going to be on the facts, Mr. Henderson:

Mr. Henderson: Our defense is going to be, your Honor, that insofar as castings were concerned the highest price charged to these particular persons is not the highest price that we got for castings during that period of time.

The Court: In March and——

Mr. Henderson: To February 1st, 1942.

The Court: What?

Mr. Henderson: To February 1st, 1942. I will go back that far.

The Court: Why do you go back that far?

Mr. Henderson: Because we have to under 244. Under Maximum Price Regulation 244 we have to go back to February 1st, 1942.

The Court: You have to go to August 1, '41.

Mr. Henderson: From August 1, '41, to February 1st, '42.

The Court: Yes.

Mr. Henderson: That is the highest price, I would say the highest up to December 31, then January, 1942, would be the price [98] that we could claim.

The Court: That is on sales made for October 26, 1942?

(Testimony of V. O. Stirnweis.)

Mr. Henderson: That is right, your Honor.

The Court: For sales made prior to that time your basis is March, 1942.

Mr. Henderson: Yes, your Honor.

The Court: And you are going to show that you charged higher prices than have been disclosed in the plaintiff's case?

Mr. Henderson: Yes, your Honor.

The Court: Well, go ahead.

Mr. Henderson: Mr. Reporter, what was the last thing.

The Court: He wanted to know about whether your labor was under your control or not.

A. Not very much.

Mr. Henderson: Q. What was your arrangement for labor, Mr. Stirnweis? A. Pardon?

Q. Did you have a collective bargaining agreement? A. Yes, we had.

Q. With whom?

A. The International Melters Union Local. However, it broke down. In fact, negotiations broke up and it was passed over to the National Board in '42 for settlement.

Q. Now let's go back to that. Let's take as of January, 1942. As of January, 1942, under what agreement were you working then? [99]

A. We were working under an annual agreement with them, terms and hours and dollars per hour.

(Testimony of V. O. Stirnweis.)

Q. That would expire when?

A. March 30th.

Q. March 30th?

A. 30th or 31st, rather.

Q. March 31 of 1942? A. Yes.

Q. At that time were negotiations under way for a new contract after March 31, 1942?

A. Yes, there was.

Q. How far had it progressed at that time?

A. Not very far. In fact, they never did get through and we knew we were going to have something and it went to the National Labor Board and there was finally an order handed down for us to pay retroactive wages to the first of April.

Q. Yes. Now do you have a comparative table of the prices as of January, 1942, and as of subsequent to the 31st day of March, 1942, or after the War Labor Board had issued its directive? Do you have that list? Do you have that table with you, Mr. Stirnweis?

A. I have some of the figures here. You mean that is on wages?

Q. Yes. Take the table that you have there and start as of January, 1942, what was your lowest class of labor.

A. This is prior to February?

Q. Prior to February 1st, 1942. [100]

A. Prior to February 1st, 1942, journeymen's rate 97-1/2 cents per hour.

Q. Now there was a War Directive issued in

(Testimony of V. O. Stirnweis.)

August, 1942, effective as of March 21st—April 1st, 1942. What was it? A. \$1.20.

Q. And what is the next item?

A. Melters and welders.

Q. As of before February 1st, 1942, what were they paid? A. 90 cents.

Q. And as of subsequent to March 31, 1942, how much? A. \$1.08.

Q. What is the next item?

A. Machine operators, which was eighty-five against \$1.07-1/2.

Q. Raised to what?

A. Dollar seven and a half.

Q. What is the next item?

A. Iron melters eighty-two and a half, raised to a dollar one-half cent.

Q. And the next one?

A. Sand blasters, from 75 to 98 cents.

Q. Finish the items.

A. Crane men 75, was raised to 93; shippers, grinders, burners, and kneading men from 70 to 88 cents; helpers and foundry laborers 62-1/2 to 80-1/2 cents. I think that is all there is.

Q. Now on a percentage basis— [102]

Mr. Wagner: Just a minute, Mr. Henderson. I wish to renew the objection and move that all of the testimony of the witness in connection with the wages be stricken on the same ground.

The Court: It may stand.

Mr. Henderson: Q. What was the greatest percentage of increase, Mr. Stirnweis?

(Testimony of V. O. Stirnweis.)

A. Well, the greatest percent was on the smallest number of men, which was sand blasters, one or two men that were 30 percent.

Q. How much? A. 30 percent.

Q. And what was the lowest?

A. The lowest was 20 percent on melters.

Q. Then your wages were increased from 20 to 30 percent by the directive of the War Labor Board; is that correct?

A. Over what they were previous to February 1st, '42.

Q. Yes. Now in January, 1942, did you have occasion to quote prices for any other concern than those four that have been mentioned by the plaintiff in this case?

A. Well, to other concerns?

Q. To any other concern, yes.

A. Oh, yes. That is, during January, you mean, or——

Q. January, '42. A. Yes.

Q. Directing your attention particularly, did you have occasion to quote prices to Marine Electric? [102]

A. Yes, we did, on a program they had.

Q. And in relation to the prices that you had been getting for materials or castings sold to Bingham Pump Company, Tuerck MacKenzie, Willamette Iron & Steel, how did they compare? Put that in percentages, if you can. Let me put it this way: Were they increased or decreased?

(Testimony of V. O. Stirnweis.)

A. Well, they were increased over what they would have been the year before—six months before.

Q. How much?

A. Approximately at least 20 percent.

Q. At least 20 percent?

A. Because that was based on our anticipated overall increased cost in '42.

Q. Relating what you manufactured, or what you were asked to manufacture for Marine Electric, relating that to what you were manufacturing for these other concerns on the material and time basis, how much would it be increased over their prices as represented by the prices that had been quoted to them prior to that time.

A. Approximately 20 percent, I would say.

Q. During the month of January, 1942, did you deliver castings to Marine Electric?

A. Yes, we delivered castings to them every month I think.

Q. Were they generally of the same type of castings as those delivered to these other persons, or to these other concerns? [103]

Mr. Wagner: Just a minute. I think that calls for a conclusion of the witness, your Honor.

The Court: He may answer it. Who was the Marine Electric?

Mr. Henderson: Marine Electric, manufacturers of equipment.

The Court: Have him tell who they were.

(Testimony of V. O. Stirnweis.)

Mr. Henderson: Yes.

Q. Who were the Marine Electric Company?

A. The company has been in existence here for a long time. They do marine work, mostly electrical work. The last couple of years the program that concerned us was the building of steam engines and electric generators, sets for marine use.

The Court: Where are they located?

A. On Thurman Street.

The Court: And who are the principals?

A. Damon Trout is the head of the company. I don't know any of the other officers.

The Court: Did they go into a new line with the war? Is that the idea?

A. Yes, somewhat of a new line. It was new for them. They started in in '42.

The Court: And how far back had you sold them castings, or was this new business beginning in '42?

A. Oh, we sold them castings occasionally. However, they never were big users. We sold them probably for seven or eight years.

The Court: They became much larger users, did they? [104]

A. Yes, on account of getting into the manufacture of the machinery end, which under other conditions they might have bought. That is, they finished machines and done the work, and so forth, themselves.

The Court: That began early in '42?

A. Yes. I think January.

(Testimony of V. O. Stirnweis.)

The Court: And have they been continuous customers since? A. Yes.

The Court: And how do they compare in monthly or yearly volume with some of these others you spoke of, beginning in '42 to now? Somebody said here he bought \$50,000.00 a year from you, and somebody else said three or four thousand dollars a month.

A. I think Marine Electric would average \$3,000 a month for the last two years. It is a sizable account every month.

The Court: You want to break the afternoon here?

Mr. Henderson: Yes, please.

(Short recess.)

Mr. Wagner: If the Court please, during the recess in conversation with the Clerk in connection with the changes that were made by amendment this morning it came to my attention that one item, sales under 244 to Tuerck MacKenzie during the period January 1st, 1943, to March 10th, 1943, amounting to \$723.99 in alleged overcharges, have been omitted and I would like at this time to re-amend Paragraph V in the [105] complaint, and also the totals on page 26 of the bill of particulars, so as to include that omitted item, resulting in the total in the bill of particulars on page 26 of \$16,168.54, the same figure applying to paragraph V of plaintiffs third cause of action in the complaint and also to the prayer of the complaint.

(Testimony of V. O. Stirnweis.)

The Court: It may be done.

Mr. Henderson: Your Honor, is this an addition or a correction in addition, or what is it?

Mr. Wagner: It is just a correction in addition, Mr. Henderson. There are no corrections as the computations stand but in the recapitulation that one item was omitted.

Mr. Henderson: I will admit the ordinary rules of arithmetic apply. Two and two make four. You may cross examine.

Cross Examination

By Mr. Wagner:

Q. You, Mr. Stirnweis, have to do with the records that are kept by Crawford & Doherty Company?

A. Not to any great extent, other than what is termed mail orders, shop orders and the billing.

Q. Do you do the billing?

A. Yes, if I am around.

Q. Do you make quotations to customers, prospective customers?

A. Yes. [106]

Q. As a matter of fact, Mr. Stirnweis, your duties have primarily to do with the operations of the foundry itself; isn't that right?

A. That is right.

Q. As superintendent of the foundry?

A. No. We have a general superintendent.

Q. You have a superintendent?

A. Who is directly over the operations.

Q. But your specific duties have primarily to

(Testimony of V. O. Stirnweis.)

do with the operations of the foundry, the making of the castings?

A. Well, some direction through me to the superintendents, but I have nothing to say in the foundry. That is, I don't go over the superintendent's head.

Q. Isn't it a fact that Mr. Card's duties are primarily those pertaining to the keeping of the company's records? A. That is right.

Q. And to the pricing structure of the various castings? A. Not to the pricing, no.

Q. To the quotations—to the quoting of prices?

A. No.

Q. To the billing?

A. Only as to keeping the records.

Q. Do you receive reports as to the company's earnings and costs of production? A. Sure.

[107]

Q. Gross sales? A. Yes.

Q. Such things as that? A. Yes; right.

Q. Do you also receive reports of various matters of litigation that the company is involved in, such as findings of the War Labor Board and their determinations in connection with labor hearings?

A. Yes.

Q. Do you have to do with the review of that? Do you have some voice in saying as to whether or not those findings or those determinations should be appealed from, or otherwise tested in courts?

A. I have a voice, yes. However, I should qual-

(Testimony of V. O. Stirnweis.)

fy that by stating, with some outside advice and probably some intercompany advice.

Q. What I am trying to arrive at is, that you and Mr. Card both have a say as to those matters?

A. Right.

Q. Are there any other officials of the company that have a voice in those determinations?

A. No, there is not.

Q. Now you mentioned the fact that by determination of the War Labor Board a certain increase in wages there was required; is that right? [108]

A. I didn't quite understand.

Q. I say, by virtue of a determination by the War Labor Board you were required to pay higher wages?

A. Yes.

Q. At a certain period of time?

A. We were ordered in August.

Q. And I also understood you to say that that had a direct effect on the methods of pricing that you employed?

A. Well, the anticipated overall costs, especially labor, early in '42.

Q. And as a result of that determination of yours the prices were raised then in April of 1942; is that right?

Mr. Henderson: Wait a minute. He didn't say April, '42.

Mr. Wagner: Q. Well, as a result of that you did raise your prices; isn't that true, Mr. Stirnweis?

A. No. It didn't result until August, '42, but

(Testimony of V. O. Stirnweis.)

the order came through to pay retroactive to April as to the increased labor rate, but everywhere else over the country practically they had asked for a raise that early in '42, got it, and we were asked for 25 cents an hour across the board early in '42. We knew they were going to get something.

Q. Then would you say, Mr. Stirnweis, that the fact that it became necessary for you to raise your wages had no bearing upon your price increases in April of 1942? A. Yes. We anticipated.

[109]

Q. You anticipated?

A. But we hadn't been ordered to pay it.

Q. You were not ordered until August of '42?

A. No.

Q. But you anticipated it in April of '42?

A. Yes; right.

Q. And that was the reason for your raising your prices in April of 1942; is that right?

A. The anticipation of the overall increase in August, especially labor, was the reason.

Q. Now did you also at the same time take into consideration the increase in your net earnings at that particular time?

A. Well, at that time our earnings were not very substantial.

Q. How did you arrive at that conclusion?

A. We arrived at it by computation of what our anticipated costs would be against what our prices had been, and we figured that our earnings would

(Testimony of V. O. Stirnweis.)

be nil, or practically so, if we did not advance the prices.

Q. Have you since determined that, as a matter of fact, your earnings were substantially increased instead of decreased?

A. Yes, they were.

Q. Was that in accord with the findings of the Emergency Court of Appeals and the Administrator in connection with your application for increases of prices?

Mr. Henderson: If the Court please, I don't want to keep [110] out anything that the Court thinks is pertinent to this matter, but I don't see the materiality of that.

Mr. Wagner: I think it is very material, if counsel only goes part way in the determination of the costs of production, that the Court know as a matter of fact the company's earnings were substantially increased, and that upon the basis of the fact that there should have been no price increase in April of 1942. That is, excluding the increased income by virtue of the raise in prices there was, as a matter of fact, as found by the Emergency Court of Appeals, an increase of earnings from 4 per cent during the period 1939 to '41, I believe, as against 12 per cent in the first half of 1943. I think that is the whole story—not only part of it.

The Court: Now just stay up while you are there. What I am interested in, I believe, is solely whether or not there was a higher price in March, 1942, than later charged in that year and prior to

(Testimony of V. O. Stirnweis.)

October 26th, 1942, and whether there was a higher price between August 1, '41, and February 1, '42, than was charged after October 26, 1942. That is what we are trying here, aren't we?

Mr. Wagner: Yes. But apparently of course the matter of good faith and practicable precautions against violations have also been pleaded and I assume that the defense is injecting this into it in support of that defense.

The Court: Mr. Henderson shakes his head. I will take [111] his word for it—it is his testimony—he is not offering it on that theory. So don't get me too far afield now. I am always interested to take little side trips, but on account of the lateness of the hour don't get me too far afield from what we are trying here. Mr. Henderson put this witness on and from what I heard in the pretrial I judge he is going to rely heavily on the fact that the Marine Electric, an account of about the same kind and volume and type of castings bought, was priced and paid more than these other three companies. That is pretty much his case. Now the witness testified 20 to 30 per cent more, and I assume that he is going to show some sales in March, 1942, which is one of the base dates, and then he had this witness testify a minute ago, rather the witness that testified that in February, '42, there were some sales made. I suppose that is going to be supplemented by some detail. I think those are the key points of this witness' testimony, and I have

(Testimony of V. O. Stirnweis.)

only felt interest in what he is saying about his labor as being a background for his charging Marine Electric more.

Mr. Henderson: That is right.

The Court: It being a new account for him.

Mr. Wagner: Nevertheless, the other defense is in the pleadings, your Honor.

The Court: All right.

Mr. Wagner: I wanted to make sure that was covered. [112]

The Court: All right. And if he defeats you on the main issue on the Marine Electric the other goes out the window as the tail with the kite, you see. If you want to, put your big guns on as to what this man testified to about the Marine Electric.

Mr. Wagner: I am getting to that, your Honor.

The Court: All right.

Mr. Wagner: Q. Now you testified also, Mr. Stirnweis, that prices were fixed before an order was accepted; is that right? A. Generally.

Q. Generally speaking. And that various elements went into the fixing of that price?

A. Right.

Q. Now in fixing those prices are certain documents and records made up, or kept, of quotations made upon the basis of certain figures, that certain figures were costs and the elements that were used in making up that price? A. Yes.

Q. And are those records maintained and kept by your concern?

A. Oh, yes and no. Some are not.

(Testimony of V. O. Stirnweis.)

Q. Some are not?

A. Some are not. However——

Q. Do you have any records of sales to the Marine Electric Company? A. Sales? Yes.

[113]

Q. And do you have some records as to quotations of prices to the Marine Electric Company?

A. Yes, we have.

Q. You have them here in court?

A. I believe they are.

Q. Now are you using those records in making the statement that your costs or your prices as to the Marine Electric were higher than the per pound cost as to the other customers that have been testified to?

A. They are higher than the per pound cost to the other customers based on their 1941 list.

Q. About how much volume was Marine Electric Company taking from you in 1941?

A. I haven't the exact figures.

Q. Do you have records that would indicate that? A. We have them in the office.

Q. Are those in court? A. No.

Q. They are not in court? A. No.

Q. Are they available?

A. They probably are. I think they are.

Mr. Wagner: I think that is all, Mr. Stirnweis. I wish at this time to move to strike all of the testimony of Mr. Stirnweis in connection with the Marine Electric transactions, [114] on the ground that

(Testimony of V. O. Stirnweis.)

it is not the best evidence, that the records of the company are the best evidence.

The Court: He is going to supplement it in detail. Aren't you going to show what he sold Marine Electric, and what he charged them, in some detail, and when?

Mr. Henderson: Well, now that your Honor has said that, yes. I hadn't anticipated that counsel was going to say a man who runs the business can't testify and that is not evidence. The best evidence, as far as what he is saying——

The Court: I am not interested in the record. For you to get up here and say that in March, 1942, he sold \$3000 to \$4000 worth of the same kind of stuff that went to these other companies, and for such and such a price, you ought to be pretty definite about it. You ought to have some records to refer to, instead of just leaving it 20 to 30 per cent, in percentages in general terms that way. But it is your case, Mr. Henderson.

Mr. Henderson: Well, yes. No; I appreciate, your Honor, the spirit in which you said that, because I want to——

The Court: You have got a point there. I would like for you to develop it.

Mr. Henderson: Yes. I want to make the best showing we can. There is no question about that. I just want to ask this witness one or two questions.

(Testimony of V. O. Stirnweis.)

Redirect Examination

By Mr. Henderson:

Q. Mr. Stirnweis, you did state that you sold to the Marine Electric in the month of March, 1942, some castings at this advanced price. Did you sell them subsequent to that in the month of February and in the month of March and on down to the present time? A. Every month.

Mr. Wagner: The same objection, your Honor. I don't think that the evidence is the best evidence. It is loose and is merely conclusions of the witness. I think if they have records of sales they should be called upon to bring them in. We tried to find them during the course of this investigation.

The Court: What do you mean by "we"? You tried to find them?

Mr. Wagner: We tried to find records of sales to Marine Electric Company that would raise the prices here that we have now set forth as their selling prices.

The Court: Did you have access to this company's books and records at any time?

Mr. Wagner: We were told that the Marine Electric Company sales were negligible at this period of time and during the course of the investigation also.

The Court: Did you have access to this defendant's books [116] and records at some time prior to this lawsuit?

Mr. Wagner: I believe we did, didn't we? (Mr. Wagner conversed with Mr. Fox in an undertone.)

(Testimony of V. O. Stirnweis.)

We were never refused access to them. I will say that.

The Court: Well, have you ever been into their books and records? You must know what I mean by that.

Mr. Wagner: I don't believe we have.

The Court: Have you, or your office investigator, ever been through their records?

Mr. Wagner: I don't believe we have ever been through their records.

The Court: Could this man tell you definitely whether you had or not?

Mr. Fox: Regardless—

The Court: Tell him and he will tell me.

Mr. Fox: We went through the sales records that they had. That was all.

The Court: Well, you say he was interested in the Marine Electric account. Did he go through that account?

Mr. Fox: I didn't see it.

Mr. Wagner: Your Honor, I am renewing the objection on that basis and, of course, would like to put our evidence on in rebuttal, too.

The Court: Oh, sure. You will have rebuttal. Go ahead now. [117]

Mr. Henderson: Mr. Reporter, will you read the question.

(The last question and answer were read.)

Mr. Henderson: Now just so that I may be correct—

The Court: I will tell you what I understood from him on direct. The Marine Electric expanded, like so many other industries, about the first of 1942, and it became a considerable purchaser for castings at the rate of \$3000 or \$4000 a month, and that has continued right down to the present time.

Mr. Henderson: Well, if that is understood, your Honor, that is all for Mr. Stirnweis.

(Witness excused.)

Mr. Henderson: If the Court please, I have thought we had the quotation we made to the Marine Electric in our file. I have just been informed by Mr. Card it is not here. Now I want to address myself strictly to what has been raised here that we want specific evidence to meet. I can put Mr. Card on for other matters now but I haven't that and I would like to approach that directly.

The Court: Put it on in the morning. That will carry us over until tomorrow then, I guess. Can you be here tomorrow a little while? Would you like to do something else with him tonight or would you rather break off?

Mr. Henderson: As far as I am concerned I would rather take this up at this point and break off at this time, if I [118] may do it.

The Court: All right.

Mr. Henderson: Thank you.

The Court: You might let counsel know what you expect to prove in the morning so he can prepare his rebuttal, if he has any. Are you going to bring in the Marine Electric account?

Mr. Henderson: Yes, your Honor.

The Court: Going back how far?

Mr. Henderson: Well, I am going to start with the quotation that we gave them in January.

The Court: '42?

Mr. Henderson: Yes.

The Court: Your deliveries were some months later, I suppose?

Mr. Henderson: Starting in that month.

The Court: Some deliveries in January?

Mr. Henderson: Yes.

The Court: And you expect then that to run through March, 1942, one of the base months, and that is your defense on the merits as to the earlier period, which ran to February 1, 1942, but you quoted and delivered in January, 1942, which is the earlier base period. What you sold in March, '42, takes care of the later?

Mr. Henderson: Yes. [119]

The Court: Oh, before you go tell me a little more about that proviso you corrected Mr. Henderson on. That is hardly the correct word—that you read after he started.

Mr. Wagner: Yes, your Honor.

The Court: Let us see what you claim for that.

Mr. Wagner: The Appendix A, providing for—

The Court: To what?

Mr. Wagner: To Maximum Price Regulation 244, section 1421.166 (1).

The Court: You won't need to read it again. My understanding of it was it supported your theory in this case, that you can hold a seller to his maximum to a particular customer?

Mr. Wagner: That is right, on a per customer basis. That is the ceiling—the August 1st, '41, to February 1st, '42, prices to Tuereck MacKenzie, the highest net prices during that period of time, governed as to his subsequent sales.

The Court: Now is that the account that is affected by that period, Tuereck MacKenzie?

Mr. Wagner: Yes.

The Court: The other two are not?

Mr. Wagner: Yes, they are. All of them, all four of the accounts are.

The Court: All four?

Mr. Wagner: Yes.

The Court: And how does it break in dollars between those [120] on your claim?

Mr. Wagner: Well, as to G. M. P. R., General Maximum Price Regulation, as to Tuereck MacKenzie amounts to fifteen hundred plus, and Bingham Pump Company amounts to a little over two thousand. That would be about \$3500.00. G.M.P.R. does not apply as to sales to Willamette Iron & Steel or the Iron Fireman.

The Court: So your point is that, even though Mr. Henderson were able to show in the morning that they charged the Marine Electric more in February, '42, —

Mr. Wagner: It would have no effect upon this company's prices on sales subsequent to October 26, 1943.

The Court: And in dollars, this \$3500, where does that fall? Your total claim now is sixteen thousand?

Mr. Wagner: \$16,168.54. The highest prices during March of '42 would affect the prices August 1st to October 26th in each of Tuerck MacKenzie and Bingham Pump Company's sales.

The Court: Let me ask my question this way: If Mr. Henderson made his point stick about the Marine Electric, would that throw \$3500 off of this \$16,000, or would it leave only \$3500 in your claim? Which way does that go?

Mr. Wagner: It would throw it off of the sixteen thousand. But let me explain just a little bit further, if the Court please. The Marine Electric had a higher price than is set forth during March of 1942 in the bill of particulars, then [121] that would reduce the \$16,168 by the \$3500, if it were determined that the Marine Electric Company were a purchaser of the same class.

The Court: I understand. That is all true.

Mr. Wagner: But as to the other sales General Maximum Price Regulation 244, as to all four of the concerns, I think the proviso governs and that each concern is governed by its base price; that is the highest net price charged during the base period to it as a customer, itself.

The Court: But Iron Fireman wasn't in business?

Mr. Wagner: Iron Fireman falls within the first classification of that same proviso under 244, namely, that the maximum price would be the highest net price at which the seller sold or offered for sale such casting to a purchaser of the same class during that period that just precedes the proviso.

Now Willamette Iron & Steel and Iron Fireman we say are purchasers of the same class.

The Court: Purchasers of the same class?

Mr. Wagner: Yes.

The Court: But if he also qualifies Marine Electric——

Mr. Wagner: As a purchaser of that class?

The Court: Yes—that would throw out Iron Fireman?

Mr. Wagner: Iron Fireman.

The Court: And Iron Fireman is about \$3400?

Mr. Wagner: \$3897. [122]

The Court: Then if he makes his point stick he would throw out \$3500 plus \$3800?

Mr. Wagner: That is right.

The Court: I am making you money pretty fast, Mr. Henderson.

Mr. Henderson: Thank you. I appreciate it.

The Court: It has a hole in the center of it so far, don't forget that. It is Chinese money so far. And that totals \$7300.

Mr. Henderson: I observe the string on it.

The Court: I suppose ten o'clock will be early enough these cold mornings.

Mr. Wagner: Thank you.

(Thereupon, at 4:11 o'clock P. M., an adjournment herein was taken until tomorrow, Wednesday, December 13, 1944, 10:00 o'clock A. M.) [123]

Wednesday, December 13, 1944, Court convened at 10:00 o'clock A. M., pursuant to adjournment,

and whereupon the following further proceedings were had herein:

V. O. STIRNWEIS

was thereupon recalled as a witness in behalf of the defendant and, having been previously sworn, further testified as follows:

Direct Examination

Mr. Henderson: May we have these two papers marked.

(The papers so offered were thereupon marked Defendant's Exhibits 27 and 28, respectively, for identification.)

Q. Mr. Stirnweis, yesterday when you were on the stand you stated that you gave a quotation to the Marine Electric Company in January, 1942. Do you now have the memoranda that you prepared at that time in your possession?

A. Yes.

Q. You are looking at the last sheet of a sheaf of papers that are marked Exhibit 27, are you not?

A. Yes.

Q. Now the paper that you are looking at is in pencil.

The Court: Is it Defendant's Exhibit?

Mr. Henderson: Yes, your Honor, Defendant's Exhibit 27.

A. Pencil memoranda.

(Testimony of V. O. Stirnweis.)

Q. Yes. The pencil memorandum was prepared by whom? [124]

A. By myself, taken from our files.

Q. And what does that memorandum represent, Mr. Stirnweis?

A. It is approximate quotation to the Marine Electric Company.

Q. What is the date at the top of it?

A. December 23rd, '41.

Q. That is when you said yesterday on the witness stand and I represented to the Court that that was in January?

A. Yes. The formal letter confirming this was written in January, dated January 31st.

Q. Yes. Then I assume you received a request from Marine Electric sometime before the 23rd of December in 1941?

A. Yes; roughly the same day or the day before.

Q. Do you know how that was transmitted to you; the date or the request for prices? Was it by telephone or by a written request?

A. The request was by telephone and I went over to their shop and inspected the blueprint of the article.

Q. You did it personally? A. Yes.

Q. Now then, what are the next papers attached to that exhibit, those white papers?

A. That is a list of the parts for small steam engine.

Q. Well, it is the parts they would require?

A. Yes.

(Testimony of V. O. Stirnweis.)

Q. Is that what you mean? [125]

A. Yes. It refers particularly to this same quotation.

Q. Now what is the first sheet of paper then, the next one?

A. That is our confirmation of price on the items.

Q. Well, that is a carbon copy of your letter, is it not? A. That is a carbon copy.

Q. I notice that there were some pencil notations on the bottom, a pencil notation on the bottom of that. Who prepared that? Who made that?

A. I made that.

Q. Was it yourself?

A. I made that. It was the identical price on the same articles that were quoted to another customer of ours.

Q. When you were testifying on the witness stand yesterday as to the prices that were quoted to the Marine Electric and the relation of those prices to Tuerck MacKenzie, Bingham Pump Company, Willamette Iron & Steel and Iron Fireman, were you referring to the data contained in Exhibit 27? Were you referring to the prices reflected by Exhibit 27? (Pause.) Mr. Stirnweis, do you understand? When you were stating yesterday, or making your statements in regard to Marine Electric and their prices, were you referring to the prices that are now set forth in Exhibit 27?

A. Yes.

Mr. Henderson: Yes. I will offer in evidence, if the Court please, Exhibit 27. [126]

(Testimony of V. O. Stirnweis.)

Mr. Wagner: Why, your Honor, I would like to make an objection: First, the exhibit is incompetent, irrelevant and immaterial. It does not indicate a delivered price. It does not have any bearing on the prices that are the subject of this controversy, and it is not a criterion for pricing or ascertaining the ceiling prices under either the General Maximum Price Regulation or Price Regulation 244.

The Court: You had better elaborate your objection. Explain your position.

Mr. Wagner: The General Maximum Price Regulation, your Honor, requires that a ceiling be determined by a delivered price. Reading from the particular provision 1499.2 of the G. M. P. R.—

The Court: Well, I will take your word for what it says. You don't need to read it.

Mr. Wagner: Likewise, Maximum Price Regulation 244 requires the pricing to be based on the highest net price on a per customer basis or per purchaser basis; that is, that the highest net price at which a casting was delivered during the period August 1st, 1941, to February 1st, 1942, to a particular or specified customer.

The Court: That is confined by its terms to per customer?

Mr. Wagner: That is right.

The Court: Let's come back to General M. P. R. Give me the exhibit we are talking about here. (The Clerk here passed paper to the Court.) [127]

It quotes here f.o.b. shop.

(Testimony of V. O. Stirnweis.)

Mr. Wagner: Well, that is not the point of the objection. The point of the objection is that the prices that are indicated there in that exhibit are not delivered prices; they are merely quoted prices or offered prices.

The Court: You mean he didn't execute this contract?

Mr. Wagner: That is right.

The Court: Well, did he or not? Did you sell during succeeding months to the Marine Electric, Mr. Stirnweis?

A. Yes.

The Court: On these quoted prices?

A. Yes.

Mr. Henderson: I asked him if all of his testimony yesterday was based on that. He said yes.

The Court: I understand. We always need to pick up facts one way or another. And their account ran three or four thousand dollars per month, I think you testified?

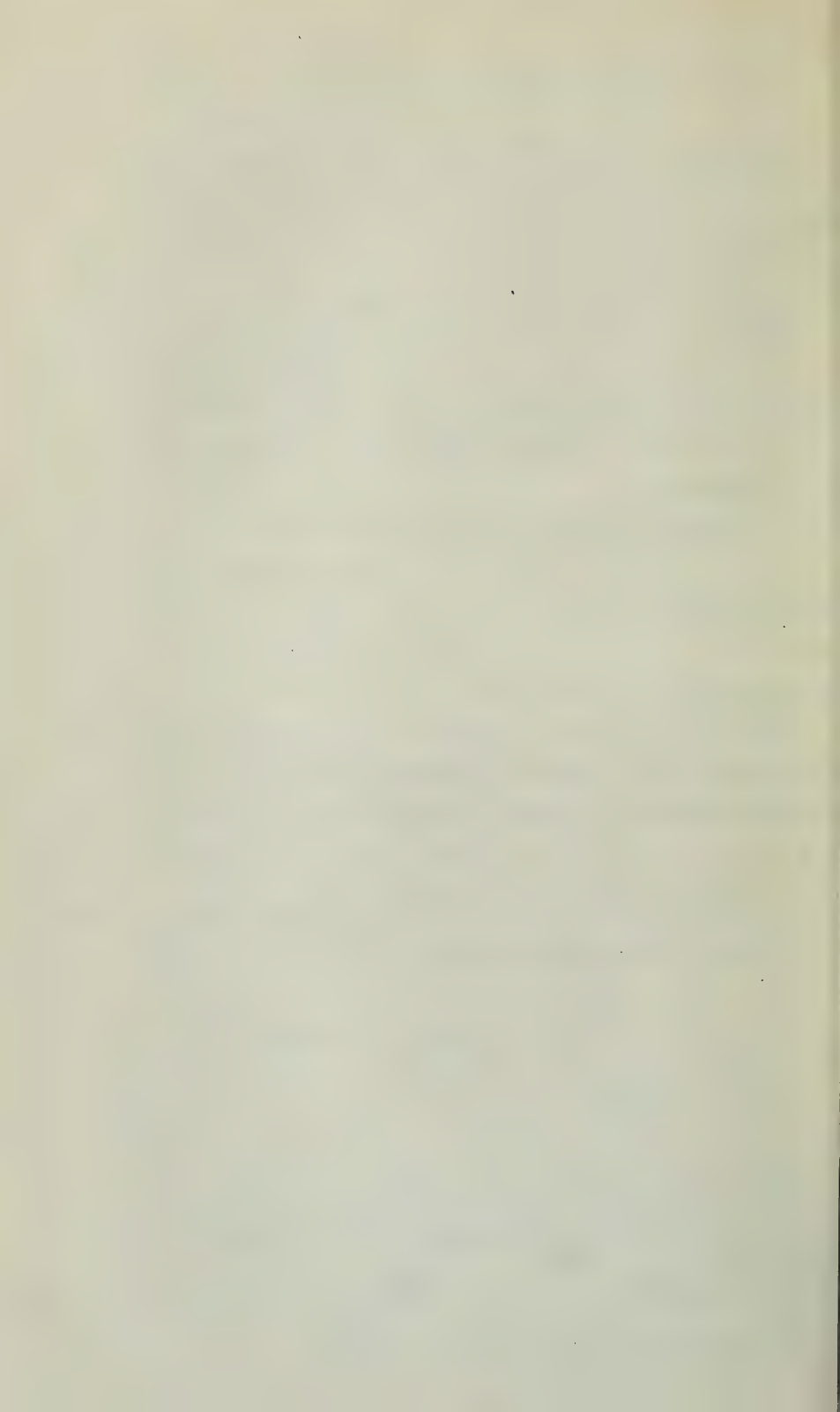
The Witness: I was estimating at that time. However, find they averaged somewhat less than that.

The Court: Well, how much?

A. Apparently very close to \$2000 a month average for the last two years.

The Court: All right. Now what is your position?

Mr. Wagner: Still the same, that the exhibit itself does not indicate anything more than a quoted or offering price as [128] of the particular date in



Part No.	Drg. No.	Title	No. Req.	Material	Est'd Wgt.	Act. wt. in	Quoted 12/1/42 Lts of 100	Actual 100% Bldg 100% Total 100%
1	D-11	Bed	1	M-B	550	637	54.00	60.00
2	A-104	Crankcase (lower-half)	1	M-D	345	387	41.40	45.50
3	C-7	Crankcase (upper-half)	1	A-D	285	270	34.20	37.20
4	A-105	Connecting Piece	1	M-B	50	93	9.30	10.00
5	C-8	Cylinder & Valve Chest	1	M-B	164	157	23.00	25.50
6	B-20	Piston	1	M-D	13-3/4	20	2.50	2.50
7	C-18	Cylinder Head	1	M-B	16 3/4	27	3.50	3.50
8	B-19	Valve	1	M-D	4 1/2	7	1.20	1.50
9	C-19	Valve Chest Head (upper)	1	M-B	7 1/4	13	1.50	2.00
10	C-19	Valve Chest Head (lower)	1	M-B	12	15	1.80	2.00
11	A-46	Valve Chest Liner	1	M-B		15	2.25	2.25
12	A-105	Stuffing Box Gland (upper connecting piece)	1	Cast Brass	2 5/8			
13	A-105	Stuffing Box Gland (lower connecting piece)	1	Cast Brass	2 5/8			
14	A-44	Stuffing Box Gland (Valve chest)	1	Cast Brass	2 5/8			
15	A-45	Valve Stem Guide	1	Cast Brass	2			
16	C-9	Oil Pump Base	1	Cast Brass	8 1/4			
17	C-11	Oil Pump Cylinder	1	Cast Brass	4 3/4			
18	A-43	Oil Pump Cap	2	Cast Brass	1 3/8			
19	C-16	Eccentric Yoke (lower-half)	1	Cast Brass	6 1/2			



Eng. No.	Title	No. Req.	Material	Est Wgt.	Est of 1/10 shorted 1 31/4	less than 100. set + 5% =
C-17	Eccentric Yoke (upper-half)	1	Cast Brass	5-1/4		
C-14	Crank-shaft Bearing Cap (long)	1	M-D	18	2'	2.10
C-15	Crank-shaft Bearing Cap (short)	1	M-D	10	1/2	1.20
B-8	Crank-shaft Bearing (long-upper)	1	Bg. Bronze	4 3/4		1.25 ea
B-9	Crank-shaft Bearing (long-lower)	1	Bg. Bronze	4 3/4		
B-11	Crank-shaft Bearing (short-upper)	1	Bg. Bronze	3 1/4		
B-10	Crank-shaft Bearing (short-lower)	1	Bg. Bronze	3 1/4		
B-15	Cross-head Slipper	1	Cast Brass			
B-13	Cross-head Bearing (upper)	1	Bg. Bronze	1 3/8		
B-14	Cross-head Bearing (lower)	1	Bg. Bronze	1 3/8		
B-12	Crank-pin Bearing	2	Bg. Bronze	10		
B-17	Cross-head Guide Bars	2	M-B		2 = 9.55 ea = 2 1/4 1.10	65 ea
B-21	Fly-wheel	1	M-D	300	not cast	245" 25.00
B-20	Inspection Door	1	M-D	30	short 27 20"	20" 3.00
B-12	Governor Adapter	1	M-D	25 lb	not cast	26" 3.10
added 2/28/42					total 210.5	
B 23 - Steam flange					✓	5.5" - 75 ea
B 24 End						4.6" - 75 ea

approx Quotation 12/23/41
 Marine Elec Co

		Q. No.	Est'd Unit Price	100 Actg Est'd Price	900 Actg Price = 10%
28	Cyl & Valve chest ^{15"} (includes Piston D includes 3 Heads)	B	200	30.00	
27	Crank case (upper half) ^{27"}	D	285	34.20	
104	✓ ✓ lower ^{38 1/2"}	D	345	41.40	
105	Connecting piece (Cyl to Crank Case)	B	50	6.00	
	Mn 137g Caps (Cyl ^{21"} & Crank ^{13"} chest)	D	30	3.60	
	Flywheel	D	300	35.00	
	Inspect Foot C7 ^{20"} - part mtd	D	30	3.60	
	Unit Base	B	550	65.00	

(Testimony of V. O. Stirnweis.)

Mr. Henderson: Q. Now Mr. Stirnweis, you have in your hand Exhibit 28? A. Yes.

Q. Just state generally what that is.

A. It is original purchase order from Iron Fireman Manufacturing Company covering several castings for Liberty engines, dated February 23rd, '42.

Q. Were those items delivered to the Iron Fireman on those prices? A. No. F.O.B. foundry.

Q. I beg pardon?

A. They are f.o.b. foundry.

Q. All your prices are f.o.b. foundry, aren't they?

A. With the exception of Federal agencies that insist on a delivered price.

Q. Yes. Well, I mean insofar as the—— [130]

A. The general practice.

Q. Yes.

A. It is understood it is f.o.b. foundry.

Q. F.o.b. foundry. Now then, did you prepare those items, and were they received by the Iron Fireman on the prices fixed in that purchase order?

A. You mean were the castings delivered?

Q. Yes. A. Yes.

Q. Now will you take the prices in that purchase order and relate them to the prices in Exhibit 28, which is the Marine Electric.

The Court: Exhibit 27.

Mr. Henderson: 27. Will you please hand that to the witness.

The Court: Compare 28 and 27.

A. The Iron Fireman price is less than Marine

(Testimony of V. O. Stirnweis.)

Electric. That is, per pound or per ton. Marine Electric were priced by each and Iron Fireman on the engine castings were quoted by the pound.

Mr. Henderson: Q. Well, supposing you had priced the Iron Fireman on the basis of the way you have——

Mr. Wagner: Objection to the question. I don't think in this particular situation a witness should be testifying as to suppositions, your Honor.

The Court: Well, let's hear the question. [131]

Mr. Henderson: Q. Supposing, Mr. Stirnweis, you had used the same price in the Marine Electric schedule on Exhibit 27 and applied that to the items contained in Exhibit 28, how would they compare as to price?

Mr. Wagner: I renew the objection.

The Court: He may answer. He has already answered. He said the Iron Fireman price was less than the Marine Electric.

Mr. Henderson: Q. What is the reason for the different manner of pricing these items in these two instances?

A. Basically it is production per man hour that is obtained.

Q. I mean, why do you submit a price schedule in a different way to Marine Electric than you did to Iron Fireman?

A. Oh, you mean by the each or by the pound?

Q. Yes.

A. Well, it seemed to be the custom in all the Liberty Ship engines to buy the castings by the

(Testimony of V. O. Stirnweis.)

pound and they insisted that quotatiton be made that way.

Q. Well, I mean the request for the quotation comes from the customer? A. Yes.

Mr. Henderson: Yes. You may cross examine.

Mr. Wagner: May I inquire, has the Iron Fireman exhibit been introduced?

Mr. Henderson: No. I want to introduce that exhibit.

The Court: 28? [132]

Mr. Henderson: 28.

Mr. Wagner: And I wish to object to its admission on the ground generally that it has no relevancy here as to this particular question.

Mr. Henderson: Counsel, for your information I think that is in accord with the exhibit you already have in evidence. It was intended for that purpose anyway. I will eliminate one item—let me have that, please.

Q. May I ask, Mr. Stirnweis, this order is dated February 23, 1942. The prices reflected by this Exhibit 28 to the Iron Fireman had been in force how long at that time, or was this an initial order?

A. That is one of the original orders from the engine plant.

Q. Now the prices on the schedule reflected by Exhibit 28, were they continued with the Iron Fireman then on through March?

A. Yes. These were quoted previous to the issuance of the order.

(Testimony of V. O. Stirnweis.)

Q. Yes. Do you remember how soon before February 23rd?

A. I am not too sure. I believe Mr. Card has the exact date. It was a verbal quotation.

Q. Were there any deliveries to Iron Fireman as early as January, 1942? A. January? No.

Q. When was the first delivery? [133]

A. I couldn't say. It was soon after this order.

Q. Yes.

Mr. Wagner: To lay a foundation for further ground of objection, your Honor, I would like to make a couple of inquiries. Mr. Stirnweis, the items in this Exhibit 28, purchase order of Iron Fireman——

Mr. Henderson: Counsel, is that February 28th or 23rd?

Mr. Wagner: February 23rd. Some of the items in here were used by the Crawford and Doherty Foundry Company to establish base prices for castings sold to Willamette Iron & Steel Corporation; is that not right? A. Yes.

Mr. Wagner: And those items are in all respects other and apart from the items that are included in the bill of particulars, in the transcripts and in the controversy that we are now having here? Is that not right, or do you know, Mr. Stirnweis?

A. Do you mean that they are the identical parts?

Mr. Wagner: No; that they are not; that they are in all respects other than those here in controversy?

(Testimony of V. O. Stirnweis.)

A. Most all of them are identical with the castings that were made for Willamette.

Mr. Wagner: Most what?

A. Most all of these items are identical with parts that were made for Willamette Iron & Steel. [134]

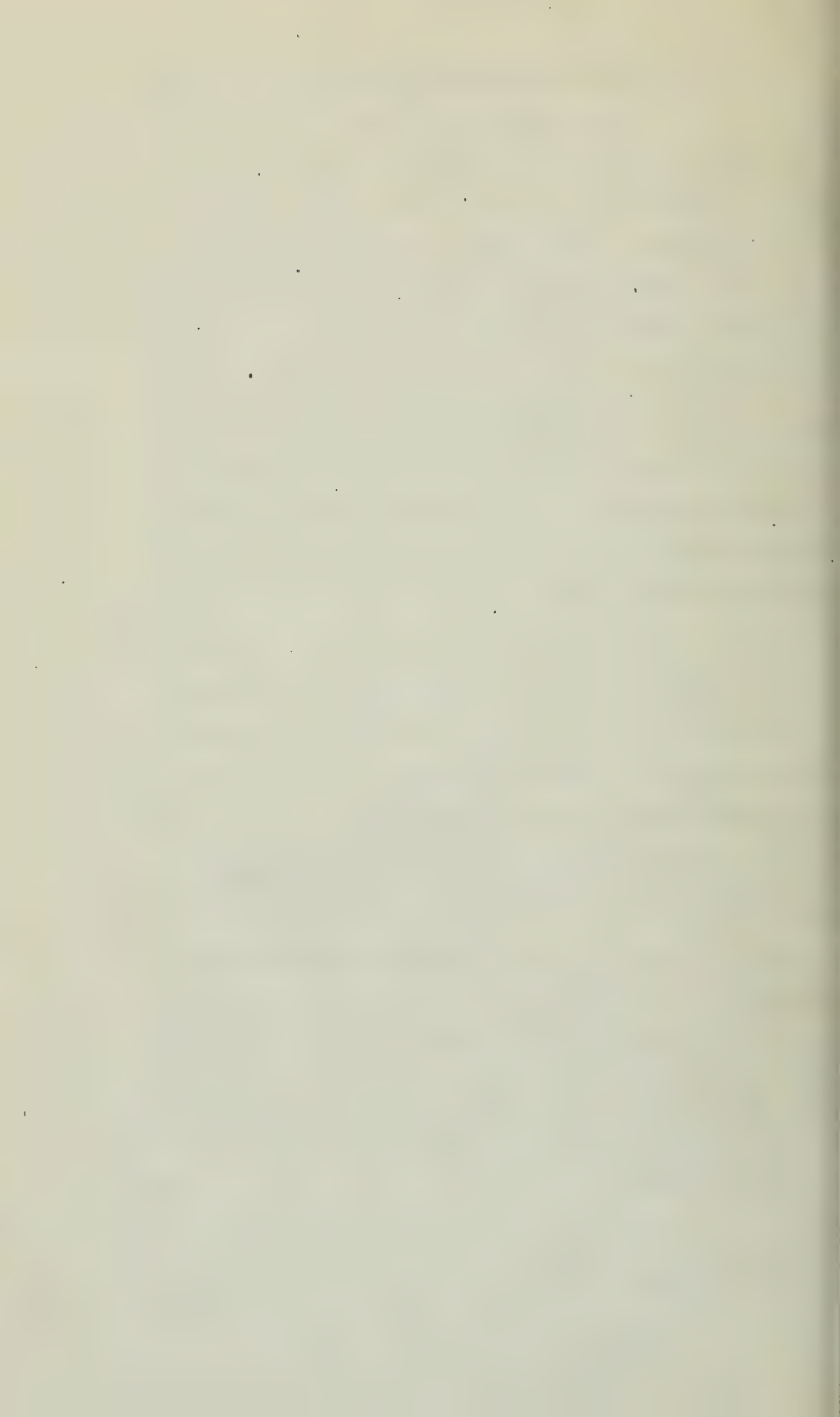
Mr. Wagner: Willamette Iron & Steel. And this exhibit is not being offered to establish any prices then under Maximum Price Regulation 244?

Mr. Henderson: It is offered to show the prices being charged Iron Fireman, comparable with the prices quoted to Marine Electric. That is the purpose of it.

Mr. Wagner: I don't see that it has any relevancy at all, then, your Honor. They are different types of castings. They are quoted on a different basis, the Marine Electric quotations being on a per each or per casting basis, these being on a per pound basis. I don't see how any similarity of pricing can be established by the introduction of the exhibit.

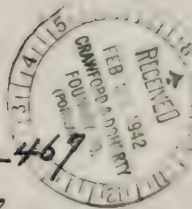
The Court: It will be admitted subject to the objection.

(The purchase order of Iron Fireman Manufacturing Company so offered and received, having been previously marked for identification, was marked received as Defendant's Exhibit 28.)



PURCHASE ORDER

ORIGINAL



Delivery

2 units June 1st

3 units July 1st

1 unit with 1000 after

2478 8 89A

Temporary

Cancelling # 2467

PAUL P. O'BRIEN

Feb. 23

194

ADDRESS

PLEASE ENTER OUR ORDER FOR THE FOLLOWING:

SHIP TO: Industrial Engineering

HOW SHIP

ADDRESS: 1870 1st Street, Astoria

QUANTITY	DESCRIPTION	PRICE	UNIT
45	H.P. G. Lumber Ciment - 18136-8	12.00	ENT
45	H.P. Valve ✓ 8905-4	✓	✓
45	H.P. Stuffing box ✓	✓	✓
45	✓ ✓ Bushings } 18148-8	8.00	ENT
45	I.P. ✓ ✓ 18149-9	✓	✓
45	Seamless - Stuffs 8893-4	✓	✓
45	H.P. Valve stem Bushings 18132-8	✓	✓
45	H.P. Valve Chest Cover 18142-8	✓	✓
45	Seamless for Seamless Stuffs 18143-8	✓	✓
135	Cast Iron Slippers 18184-8	✓	✓
45	I.P. Indicator Gas sleeves 18243-8	✓	✓
45	H.P. ✓ ✓ 18244-8	✓	✓
45	Blowing Bushings 18268-8	✓	✓
45	Quartz Valve Holes 18294-8	✓	✓
45	L.P. Valve Mandrels 5938-2	8.00	✓
45	Woolfite Cover L.P. 8910-4	8.50	✓
45	Cover L.P. 8910-4	✓	✓
45	L.P. Piston Alkerming 18282-8	✓	✓
45	L.P. ✓ 18282-8	✓	✓
45	I.P. Piston Follows Ring 18121-8	✓	✓

IMPORTANT

PUT NUMBER OF THIS ORDER ON YOUR
INVOICE, PACKING LISTS AND PACKAGES.

PLEASE SEND

COPIES OF YOUR INVOICE

Plaintiff Defendant's

EXHIBIT 28 for Record

A. W. PERSON

BY

C.R. No. 7124

Signature

PURCHASING AGENT

(Testimony of V. O. Stirnweis.)

Mr. Henderson: You may take the witness.

Cross Examination

By Mr. Wagner:

Q. You mentioned, Mr. Stirnweis, that this quotation given by Exhibit 27, Crawford and Doherty Foundry Company to Marine Electric Company, was identical with the prices given another customer and referred to a notation on the exhibit? [135]

A. A pencil notation at the bottom of the carbon copy.

Q. Were you referring to this notation, "February 6, 1942, quoted Tripp of Bamford Chase exactly same as above by phone"?

A. It was by phone.

Q. Is that the notation you were referring to when you made that statement?

A. Yes, the same as that statement.

Q. That was the quotation you made to Tripp of Bamford Chase subsequent to the time that this was worked up? A. Yes.

Q. Since this time, since the time of this January, 1942, quotation, have all of the sales of castings to the Marine Electric Company been on a per each basis? A. Yes, all of them.

Q. You never sold to Marine Electric on a per pound basis? A. No. No.

Mr. Wagner. That is all.

Mr. Henderson: That is all, Mr. Stirnweis.

(Witness excused.)

DEAN B. CARD

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn testified as follows:

Direct Examination

By Mr. Henderson: [136]

Q. Your name is Dean B. Card? A. Yes.

Q. And what is your business?

A. Secretary-Treasurer of Crawford and Doherty Foundry Company.

Q. How long have you been with Crawford and Doherty Foundry Company?

A. Since December, 1927.

Q. How long have you been Secretary-Treasurer of the company? A. Since December, 1927.

Q. In a general way what are your duties?

A. Supervise the keeping of the records.

Q. Did you ever have any occasion yourself to quote prices? A. Not by myself.

Q. When did Crawford and Doherty first have any communications or negotiations with the Office of Price Administration? About when?

A. About July, 1942.

Q. And through what source? Through whom?

A. Through Mr. Lasley.

Q. Who is he?

A. He was the head of the Iron and Steel pricing office.

Q. Yes. Lasley is his name? A. Lasley.

Q. Whom did he communicate with in Crawford & Doherty? A. With me. [137]

(Testimony of Dean B. Card.)

Q. And what in regard to?

A. I called him to ask how we could properly increase the Willamette prices to the same basis as the Iron Fireman prices?

Q. Thereafter, from July 4th, were you in communication with the Office of Price Administration fairly regularly?

A. Not regularly. Several different times about the same matter.

Q. Did you have occasion to discuss with them prices, and the application of price rates to one customer and the other?

A. I can't quite hear that.

Q. Did you have occasion to discuss with the officers of the Office of Price Administration, local office, the fixing of your prices? A. Yes.

Q. Whom were your contacts with principally?

A. Later contacted Mrs. Cooper.

Q. And who else?

A. Mr. Fox, Mr. MacCormac Snow, Mr. McDannell Brown. There were several others. I don't recall their names.

Q. Yes. Did you take any action in respect to moneys due on invoices as to any of these companies after conferring with the Office of Price Administration? A. Yes.

Q. What did you do?

A. We divided the invoices of Willamette Iron & Steel at October [138] 26th, and as to those before October and those after October, and advised them to retain the amount that was in question.

(Testimony of Dean B. Card.)

Q. Did they retain the amount in question?

A. They did.

Q. How much?

A. Ninety-three hundred and some odd dollars.
I believe it is ninety-three hundred thirteen.

Q. Do you mean, Mr. Card, that they have in their possession at the present time ninety-three hundred and some dollars that is sought by the Government in this litigation? A. Yes.

Q. Did you request any other company to?

A. Yes.

Q. What other company?

A. Bingham Pump Company and Tuerck MacKenzie Company.

Q. How much does Bingham Pump Company have in its possession?

A. I believe it is \$5143.

Q. And how much does the Tuerck MacKenzie, the other one, how much does it have in its possession? A. They have \$1908.

Q. Do you know whether the Government knew of this fact before this suit was instituted?

A. Yes.

Q. How do you know that they knew of it?

A. Because they wrote letters to each of the three customers [139] stating the fact.

Q. Do you have copies of those letters?

A. I have them in my papers.

Q. Will you produce them, please?

A. They are in your file, or Mr. Randall's file.

(Testimony of Dean B. Card.)

Mr. Henderson: Do the Government Attorneys have in their possession the office or carbon copy of these letters?

Mr. Wagner: I imagine. I don't know what letter you are referring to, though.

Mr. Henderson: You know that your office wrote some letters in which they, on the 22nd day of July, 1942, before this suit was started, referred——

Mr. Wagner: There is a great deal of correspondence, Mr. Henderson.

Mr. Henderson: In which they referred to the amount of money that was being retained by them.

The Witness: I believe there is another folder, Mr. Randall.

Mr. Wagner: I do recall that a number of communications were carried on, Mr. Henderson, in connection with a settlement of this matter, and if that is the correspondence you are referring to——

Mr. Henderson: That is not.

Mr. Wagner: —it certainly is not relevant here.

Mr. Henderson: That is not.

Q. Where did you get these photostatic copies of these letters [140] you have, Mr. Card?

A. From the original letters.

Q. In whose possession?

A. I beg pardon?

Q. In whose possession are they?

A. I can't hear that.

Q. In whose possession are the original letters?

A. The customers'.

(Testimony of Dean B. Card.)

Mr. Henderson: Mr. Wagner, do you have a copy of a letter written July 22nd and signed by you as Enforcement Attorney, addressed to Willamette Iron & Steel?

Mr. Wagner: It will probably take me some time to find it, Mr. Henderson.

Mr. Henderson: Mark this, will you, please.

Mr. Wagner: Mark it?

Mr. Henderson: Yes, for an exhibit.

(The photostatic copy of letter dated July 22, 1943, F. E. Wagner, Enforcement Attorney, to Willamette Iron & Steel Corporation, so offered, was marked Defendant's Exhibit 29 for identification.)

Mr. Wagner: Are you making an offer at this time?

Mr. Henderson: If you will examine it I will pass it to the witness. I am just trying to save time. [141]

Mr. Wagner: Are you offering it?

Mr. Henderson: As soon as I have it identified, unless you are willing to admit you wrote such a letter.

Q. Now Mr. Card, refer to Defendant's Exhibit 29 and state in a general way what that is. What is it you have in your hand there?

A. A copy of the letter to Willamette Iron & Steel Corporation.

Q. You have seen the original of that letter?

A. Yes, sir.

(Testimony of Dean B. Card.)

Q. And who arranged for having a photostatic copy made? A. I did.

Q. And the photostatic copy was made by whom?

A. Swender Blue Print Company.

Q. Under your supervision?

A. I gave them the original to copy, yes.

Mr. Henderson: Yes. All right. I offer in evidence this Exhibit 29.

The Court: What does it say?

Mr. Wagner: I would like to ask a few questions before making my objection.

The Court: What does it say? Somebody tell me what it says.

Mr. Henderson: It says there are certain amount of money being withheld. They recognize that certain amounts of money are being withheld. It says, "We are informed that a total of \$9677.93 has been withheld by your firm on sales of gray [142] iron castings"—

The Court: Just tell me in a few words. What does he say to do with the money? What was the purpose of the letter?

Mr. Wagner: The purpose of the letter was a settlement of this controversy, and that was the reason for the letter, and the figures that are quoted in the letter were figures that were given me by Mr. Card.

The Court: Does the letter assume to tell them what to do with the money?

Mr. Wagner: No, it doesn't.

(Testimony of Dean B. Card.)

Mr. Henderson: The only purpose I am offering this letter for, if the Court please—it hasn't anything to do with what counsel is talking about. One of the things involved here, I suppose, is our good faith.

The Court: Yes. All right.

Mr. Henderson: Well, as showing that the Government, before it started this action, knew that we had done this.

The Court: What is the date that you stated a while ago?

Mr. Henderson: July 22, 1942.

The Court: No. This date he gave a while ago when he began to withhold. October what?

Mr. Henderson: October—right after October 26th.

The Court: October 26th, 1942?

Mr. Henderson: That is when 244 went into effect.

The Court: October 26, 1942? [143]

Mr. Henderson: 1942.

The Court: Take them to Mr. Wagner.

Mr. Wagner: I had just as soon make my objection now.

The Court: All right. State your objection. He wants to put in all three letters. There are three similar letters.

Mr. Wagner: All right.

The Court: You wrote the letter?

Mr. Wagner: That is right.

(Testimony of Dean B. Card.)

The Court: Those are photostatic copies of them?

Mr. Wagner: Yes. There is no question about that.

The Court: Now state your objection to all three of them. You don't need to identify them further.

Mr. Wagner: Very well.

The Court: Give them one exhibit number, Mr. Person.

Mr. Henderson: 29 is the first one.

Mr. Wagner: The objection to this Exhibit 29 is that the letter——

The Court: They are going to have one exhibit number. These three letters will be one exhibit.

Mr. Wagner: Yes, that is right. The letters are incompetent, irrelevant and immaterial to this controversy. The letters are also self-serving; that they were obtained from the Office of Price Administration pursuant to an agreement for a settlement of this controversy; that they are not the best evidence, in that the figures therein quoted were supplied to the [144] writer of the letters by Crawford & Doherty Foundry Company.

The Court: Pardon me. What is the date of the letters, Mr. Person?

The Reporter: July 22, 1943, July 20, 1943 and July 21, 1943.

The Court: Mr. Wagner, do I understand—my memory slipped along here last night about some of the testimony yesterday. This claim of the Gov-

(Testimony of Dean B. Card.)

ernment covers these sales made since October 26, 1942, for which these sums have been withheld?

Mr. Wagner: That is right, your Honor.

The Court: That is right?

Mr. Wagner: And a further ground of my objection to these letters is that the claim of the Government is based upon the prices at which the castings were delivered, and that the withholding or offsetting, or refunding, or repayment of any amounts on any of the accounts involved are immaterial to the position of the Government in making its claim.

The Court: This case was filed on July 31st, '43?

Mr. Wagner: That is right, sir.

The Court: All right. They are admitted, subject to the objection.

(The photostatic copy of letter dated July 22nd, 1943, F. E. Wagner, Enforcement Attorney, to Willamette Iron & Steel Corporation, so offered and received, having previously [145] been marked for identification, was marked received as Defendant's Exhibit 29; and, pursuant to the foregoing, a photostatic copy of letter dated July 20, 1943, F. E. Wagner, Enforcement Attorney, to Bingham Pump Company, and a photostatic copy of letter dated July 21, 1943, F. E. Wagner, Enforcement Attorney, to Tuereck MacKenzie Co., so offered and received, were attached to and made a part of Defendant's Exhibit 29.)

(Testimony of Dean B. Card.)

DEFENDANT'S EXHIBIT NO. 29

Office of Price Administration

Bedell Building

Portland, Oregon

July 22, 1943

Willamette Iron & Steel Corporation

3050 N. W. Front Avenue

Portland, Oregon

Attention: Mr. W. B. Porter

Gentlemen:

Subject: Charges in excess of ceiling
prices by Crawford & Doherty Foundry
Company on sales to you of grey
iron castings. Case No. 8410-00127

At the request of Mr. Card of Crawford & Doherty Foundry Company, we are herewith submitting an itemization recently taken from the foundry company's records indicating excessive charges made by it on sales to you of grey iron castings on transactions occurring during the period from October 26 to December 31, 1942.

(Testimony of Dean B. Card.)

Date	Inv. No.	Description	Ceiling	Chg.	Wt.	Total Amt. of Invoice	Overcharge
10/30/42	28046	M.P. Cyl.	101½	12	15,780	\$1,893.60	\$ 236.70
11/28/42	28177	M.P. Cyl.	101½	12	47,160	5,659.20	707.44
11/28/42	28231	Ecc. Strap	8	8½	57,980	4,928.30	289.90
11/28/42	28231	Slipper	8	8½	1,950	165.75	9.75
11/30/42	28244	L.P. Cyl.					
		Cover	7½	8½	7,100	641.75	75.50
11/30/42	28245	L.P. Cyl.					
		Cover	7½	8½	10,650	3,065.10	306.60
12/26/42	28428	M.P. Cyl.	101½	12	16,000	1,920.00	240.00
12/31/42	28511	M.P. Cyl.	101½	12	47,970	5,756.40	719.55
12/31/42	28530	L.P. Cyl.					
		Cover	7½	8½	103,830	8,825.55	1,038.30
Total.....							\$3,623.70

We are informed that a total of \$9,677.93 has been withheld by your firm on sales of grey iron castings to you by Crawford & Doherty Company most of which was so withheld for reason that overcharges were being made you. Deducting from this figure the above \$3,623.70 would leave a net balance due Crawford & Doherty from Willamette Iron and Steel Corporation in the sum of \$6,054.23.

The above sums indicated as being withheld by your firm, as well as the balance due, are subject to your confirmation which we would appreciate having at your early convenience.

Very truly yours,

F. E. WAGNER

Franz E. Wagner

Enforcement Attorney

(Testimony of Dean B. Card.)

Portland District Office

Office of Price Administration

Bedell Building

Portland, Oregon

In Reply Refer To: 8Po:FEW(L)

July 20, 1943.

Bingham Pump Company

705 S. E. Main

Portland, Oregon

Re: Charges in excess of ceiling prices by
Crawford and Doherty Foundry Co.

Gentlemen:

We understand that you have been informed as to certain overcharges or charges in excess of ceiling prices on sales of grey iron castings to you by Crawford and Doherty Foundry Company, amounting, during the period of time between the first day of August, 1942, and the 10th day of March, 1943, to the sum of \$5,313.87. These are the result of the following: violations under General Maximum Price Regulation 8/1/42 to 10/26/42, \$2,038.73; violations under Maximum Price Regulation 244 during the period from 10/26/42 to 1/1/43, \$1,954.80; violations under Maximum Price Regulation 244 from 1/1/43 to 3/10/43, \$1,320.34.

We are likewise informed that your concern commenced withholding certain sums of money, for the reason that overcharges were being made, on November 5, 1942, covering deliveries made during September and October of that year. The result of these withholdings left net amounts of overcharges in the sum of \$1,126.05.

(Testimony of Dean B. Card.)

The total amount withheld by your concern from remittances due Crawford and Doherty, we are informed, amounts to \$5,143.98, of which the amount deducted to arrive at the above figure, namely, \$4,187.82, you are at the present time entitled to withhold. This leaves your net balance due to Crawford and Doherty in the sum of \$956.16.

The foregoing figures indicated as amounts withheld on your account with Crawford and Doherty Company are represented to us as being correct. However, we would appreciate your confirmation at your early convenience.

Very truly yours,

F. E. WAGNER

Franz E. Wagner

Enforcement Attorney.

Office of Price Administration

Bedell Building

Portland, Oregon

July 21, 1943

Tuerck Mackenzie Co.

687 N. Thompson Street

Portland, Oregon

Gentlemen:

Re: Charges in excess of ceiling prices by
Crawford & Doherty Foundry Com-
pany.

We understand that you have been informed for some time past concerning certain overcharges or

(Testimony of Dean B. Card.)

charges in excess of ceiling prices on the sales to you of grey iron castings by Crawford & Doherty Foundry Company amounting, during the period of time between the 1st day of August, 1942 and the 10th day of March, 1943, to the sum of \$3,333.95. These are the results of the following: violations under General Maximum Price Regulation from 8/1/42 to 10/26/42, \$1,540.55; violations under Maximum Price Regulation 244 during the period from 10/26/42 to 1/1/43, \$1,069.41; violations under Maximum Price Regulations 244 from 1/1/43 to 3/10/43, \$723.99.

It has been disclosed to us by Crawford & Doherty Foundry Company that commencing during the month of December, 1942 your firm commenced withholding certain sums of money from remittances from your account with Crawford & Doherty because of the fact that overcharges were being made.

The total amount withheld by your concern from remittance due Crawford & Doherty, we are advised, amounts to \$1,908.20 of which the amount deducted to arrive at the above figure of \$1,395.83 you, at the present time, are entitled to withhold. This leaves your net balance due Crawford & Doherty in the sum of \$512.37.

The foregoing figures indicated as amounts withheld on your account to the Crawford & Doherty Company are represented to us as being correct;

(Testimony of Dean B. Card.)

however, we would appreciate confirmation of these at your earliest convenience.

Very truly yours,

F. E. WAGNER

Franz E. Wagner

Enforcement Attorney

Mr. Henderson: Q. Mr. Card, have the moneys referred to in the letters and in the bill of particulars of the Government ever yet been received from these three customers? A. No.

Q. That is, these three customers now retain in their possession the money represented by these sums in the bill of particulars; is that correct?

A. Yes.

Mr. Henderson: Will you please have this marked.

(The tabulation headed "Crawford & Doherty Foundry Co. Comparative Price Schedule, was marked Defendant's Exhibit 30 for identification.) [146]

Q. Mr. Card, have you had occasion to compute the prices charged to Marine Electric Company on the basis of the prices charged to Bingham Pump Company and Tuerck MacKenzie and relate them one to the other? A. Yes.

Q. Did you prepare a compilation of that?

A. Yes, sir.

(Testimony of Dean B. Card.)

Q. Is that what you have in your hands, Defendants' Exhibit 30 for identification? A. Yes.

Q. Mr. Card, where did you get your basis for the prices being charged Tuerck MacKenzie and Bingham Pump Company?

A. From quotations, invoices, or from the price schedules that we used in pricing their order.

Q. What business were you in before you were Secretary-Treasurer of the company?

A. Certified Public Accountant.

Q. You are a Certified Public Accountant

A. Yes, sir.

Q. And do you know whether or not that paper that you have in your hands, Exhibit 30, accurately and correctly, from a mathematical standpoint, reflects these various prices? A. Yes, sir.

Mr. Henderson: I offer in evidence, if the Court please, Defendant's Exhibit 30. [147]

Mr. Wagner: The objection is on the ground of immateriality and irrelevancy generally. It indicates nothing that could be used within the broadest meaning of the terms and provisions of the regulations for establishing base prices. The exhibit reflects figures that are nothing more than conclusions, conjectures and opinions, and establishes nothing which indicates deliveries of any castings at any particular prices.

The Court: It is admitted. It is preliminary, I take it, to what is to follow now.

(The tabulation so offered and received,

(Testimony of Dean B. Card.)

having been previously marked for identification, was marked received as Defendant's Exhibit 30.)

DEFENDANTS' EXHIBIT No. 30

CRAWFORD & DOHERTY FOUNDRY CO.

COMPARATIVE PRICE SCHEDULE

Showing highest price charged for Gray Iron Castings in March 1942 compared with prices that would have been charged for the same or similar castings if priced according to price schedules covering Gray Iron Castings sold to Bingham Pump Co. and Tuerck-MacKenzie Co. after April 13, 1942.

Invoice Date 1942	Item	Weight Each	Price Each	Equivalent Price Per Pound	Price per lb. for same or similar Item if sold to	
					Bingham Pump- Co.	Tuerck- MacKen- zie Co.
As Sold in Mar. 1942 to Marine Electric Co.						
3/31	D5 Conn Box E	21#	\$ 4.00	19.1c	14c	11c
3/31	D15 Spider B	96#	15.00	15.6c	14½c	12½c
3/31	C22 Cyl & Chest B	164#	30.00	18.3c	14c	12½c
3/26	3" Christenson Box E	1¼#	.23	18.4c	14c	17c
3/31	D6 Conn Box E	15#	2.85	19c	14c	11c
3/31	B2 Clamp E	1#	.20	20c	14c	12c
3/31	B19 Valve D	6#	1.50	25c	15c	12c
3/31	A46 Liner B	14#	3.00	21.4c	16c	13c
3/31	C20 Door D	20#	3.00	15c	15c	13c
3/31	B24 Flange D	5#	.75	15c	15c	14c
3/31	D11 Bed Plate (or Base Plate)	600#	60.00	10c	9½c	none

Average Prices
on
Sales in March 1942
to
Marine Electric Co.
13.09c per lb.

Average Prices on Sales in Months of
July-Aug.-Sept.-Oct.-1942 when schedules
of April 13, 1942, were in full effect
Bingham
Pump Co.
13.08c per lb.

Tuerck-
MacKenzie Co.
12.24c per lb.

(Testimony of Dean B. Card.)

Mr. Wagner: I wish also, in addition to the objection, to use the same grounds of the objection for a motion to strike all of the testimony of the witness in connection with this exhibit.

The Court: The motion is denied.

Mr. Henderson: I would like to have this marked for identification, please.

(The eleven invoices of Crawford & Doherty Foundry Company to Marine Electric Company so offered were marked Defendant's Exhibit 31 for identification.) [148]

DEFENDANT'S EXHIBIT No. 31

Phone LANcaster 2185

CRAWFORD & DOHERTY FOUNDRY COMPANY

4604 S. E. 17th Avenue

Portland 2, Oregon

1/12/42

	Your Req. No. 9653
Sold To Marine Electric Co.	Our No. 25614
	Inv. No. 25988
Shipped To Same	Terms Net 10 Prox

1	c3	Cover	8.50
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This is to certify that the merchandise listed in this invoices has been produced in accordance with the Fair Labor Standards Act of 1938.

We are not responsible for loss or damage of pattern equipment by fire or otherwise. Storage will be charged on patterns left on our premises longer than six months after date of last order for castings therefrom.

[Crawford & Doherty Foundry Company Statement]

1/13/42

	Your Req. No. 9690
Sold To Marine Electric Co.	Our No. 25620
	Inv. No. 25989
Shipped To Same	Terms Net 10 Prox

1	C8	Cyl & Vale Chest "Normalize"	27 50
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(Testimony of Dean B. Card.)

[Crawford & Doherty Foundry Company Statement]

1/13/42

Sold To	Marine Electric Co.	Your Req. No. 9716
		Our No. 25620
		Inv. No. 25990
Shipped To	Same	Terms Net 10 Prox

1	C7	Crankease	37.20
1	C7	Crankease Door	3.00
1	C14	Cap	2.20
1	C15	Cap	1.10
			43.50

[Crawford & Doherty Foundry Company Statement]

1/13/42

Sold To	Marine Electric Co.	Your Req. No. 9763
		Our No. 25620
		Inv. No. 25991
Shipped To	Same	Terms Net 10 Prox

1	C14	Cap	2.20
1	C15	Cap	1.10
			3.30

[Crawford & Doherty Foundry Company Statement]

1/15/42

Sold To	Marine Electric Co.	Your Req. No. 9792
		Our No. 25640
		Inv. No. 26024
Shipped To	Same Called	Terms Net 10 Prox

2	#961	Cover Plate 3 x 5 x 3/16.....	1.00
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[Crawford & Doherty Foundry Company Statement]

1/19/42

Sold To	Marine Electric Co.	Your Req. No. 9760
		Our No. 25634
		Inv. No. 26042
Shipped To	Call	Terms Net 10 Prox

1	D5	Water tight box	}	7.25
1	D6	Water tight cover		
1	B2	Clamp		

(Testimony of Dean B. Card.)

[Crawford & Doherty Foundry Company Statement]

1/22/42

Sold To	Marine Electric Co.	Your Req. No. 60
		Our No. 25655
		Inv. No. 26043
Shipped To	Call	Terms Net 10 Prox

1	X105 Conn Pc	10.00
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[Crawford & Doherty Foundry Company Statement]

1/27/42

Sold To	Marine Electric Co.	Your Req. No. 116
		Our No. 25691
		Inv. No. 26083
Shipped To	Call	Terms Net 10 Prox

3	Small Face Plate	4.50
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[Crawford & Doherty Foundry Company Statement]

1/27/42

Sold To	Marine Electric Co.	Your Req. No. 122
		Our No. 25691
		Inv. No. 26083A
Shipped To	Call	Terms Net 10 Prox

2	B17	Gib $1\frac{3}{4}$ x $9\frac{3}{4}$ x $11\frac{1}{2}$	1.50
1	C18	Cyl Head $9\frac{3}{4}$ dia	3.25
1	B20	Piston $6\frac{1}{4}$ dia $2\frac{3}{4}$ o/a $\frac{7}{8}$ core.....	2.50
			7.25

(Testimony of Dean B. Card.)

[Crawford & Doherty Foundry Company Statement]

1/27/42

Sold To	Marine Electric Co.	Your Req. No. 108
		Our No. 25686
		Inv. No. 26084
Shipped To	Call	Terms Net 10 Prox

1	C19	Valve Chest Head Upper	2.00
1	C19	Valve Chest Head Lower.....	2.00
1	A46	Liner	2.00
1	B19	Valve Core	1.50
			7.50

[Crawford & Doherty Foundry Company Statement]

1/28/42

Sold To	Marine Electric Co.	Your Req. No. 63
		Our No. 25669
		Inv. No. 26085
Shipped To	Call	Terms Net 10 Prox

1	B11	Engine Base	60.00
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Mr. Henderson: And mark these also, please.

(The seven copies of invoices of Crawford & Doherty Foundry Company to Marine Electric Company so offered were marked Defendant's Exhibit 32 for identification.)

(Testimony of Dean B. Card.)

DEFENDANT'S EXHIBIT No. 32

Phone LAncaster 2185

CRAWFORD & DOHERTY FOUNDRY COMPANY

4604 S. E. 17th Avenue

Portland 2, Oregon

3/21/42

Sold To Marine Electric Co.

Your Req. No. 1201

Our No. 0092

Inv. No. 26386

Shipped To Call

Terms Net 10 Prox

25	B29	Piston	3.00 ea	75.00
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This is to certify that the merchandise listed in this invoice has been produced in accordance with the Fair Labor Standards Act of 1938.

We are not responsible for loss or damage of pattern equipment by fire or otherwise. Storage will be charged on patterns left on our premises longer than six months after date of last order for castings therefrom.

[Crawford & Doherty Foundry Company Statement]

3/26/42

Sold To Marine Electric Co.

Your Req. No. 860

Our No. 0074

Inv. No. 26387

Shipped To Call

Terms Net 10 Prox

L 60	3" Christenson Box.....	.23 ea	13.80
	(1.25 lb. each) E	[.181 in pencil]	

[Crawford & Doherty Foundry Company Statement]

3/31/42

Sold To Marine Electric Co.

Your Req. No. 403

Our No. 25744

Inv. No. 26403

Shipped To Call

Terms Net 10 Prox

A 8	D11	Bed Plate (600 lb. each).....	60.00 ea	480.00
L 3	X104	Crank Case Lower	45.50 ea	136.50
L 6	C7	Crank Case Upper	37.20 ea	223.20
L 2	C8	Cyl. & Valve Chest (160#ea.)	27.50 ea	55.00
A 17	B17	Crosshead Guide Bar .....	.65 ea	11.05
H 5	B21	Flywheel	26.25 ea	131.25
				1037.00

(Testimony of Dean B. Card.)

[Crawford & Doherty Foundry Company Statement]

3/31/42

		Your Req. No. 940	
Sold To Marine Electric Co.		Our No. 0051	
		Inv. No. 26404	
Shipped To Call		Terms Net 10 Prox	
A 2	D11	Bed Plate	60.00 ea 120.00
L 3	X104	Crank Case	45.50 ea 136.50
L 1	C7	Crank Case	37.20 ea 37.20
A 17	D17	Connector Piece	11.00 ea 187.00
L 22	C22	Cyl. & Valve Chest (164# ea.) B	30.00 ea 660.00
H 20	B29	Piston	3.00 ea 60.00
H 25 ?	C23	Cyl. Head	4.00 ea 100.00
L 11	B19	Valve	1.50 ea 16.50
A 20	C19	Upper Valve Chest Head.....	2.00 ea 40.00
A 20	C19	Lower Valve Chest Head.....	2.00 ea 40.00
L 7	A46	Liner	3.00 ea 21.00
H 24	C14	Cap long	2.20 ea 52.80
A 24	C15	Cap short	1.25 ea 30.00
A 41	B17	Crosshead Guide Bar .....	.65 ea 26.65
H 23	B21	Flywheel	26.25 ea 603.75
A 25	C20	Inspect. Door	3.00 ea 75.00
A 7	D12	Gov. Adapter	3.25 ea 22.75
H 20	B24	Exh. Flange .....	.75 ea 15.00
			2244.15

(Testimony of Dean B. Card.)

[Crawford & Doherty Foundry Company Statement]

3/31/42

Sold To	Marine Electric Co.	Your Req. No. 940
		Our No. 0052
		Inv. No. 26405
Shipped To	Call	Terms Net 10 Prox

BA 25	D15	Spider (96 lbs. each).....	15.00 ea	375.00
A 25	D3	Brush Spider	2.10 ea	52.50
A 5	D13	End Bell	28.50 ea	142.50
EA 24	D5	W T Conn. Box (21 lbs. each)	4.00 ea	96.00
EL 25	D6	W T Conn. Box Cover		
		(15 lb. each).....	2.85 ea	71.25
L 5	B2	Clamp 1 3/16 .....	.20 ea	1.00
EL 5	B2	Clap 11/16 (1 lb. each).....	.20 ea	1.00
A 5	C12	Dummy End Bell R	3.25 ea	16.25
A 5	C12	Dummy End Bell L	3.25 ea	16.25
				771.75

[Crawford & Doherty Foundry Company Statement]

3/31/42

Sold To	Marine Electric Co.	Your Req. No. 439
		Our No. 25743
		Inv. No. 26406
Shipped To	Call	Terms Net 10 Prox

A 4	D4	Spider (96 lbs. each)B	15.00 ea	60.00
L 2	B2	Clamp 1 13/16 (2 lbs. each)....	.20 ea	.40
L 3	B2	Clamp 11/16 (1.3 lbs. each)....	.20 ea	.60
A 7	D7	End Bell (200 lbs. each).....	28.50	199.50
				260.50

[Crawford & Doherty Foundry Company Statement]

3/31/42

Sold To	Marine Electric Co.	Your Req. No. 1325
		Our No. 0111
		Inv. No. 26432
Shipped To	Call	Terms Net 10 Prox

A 1	81¼ Dia Face Plate	2.50
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(Testimony of Dean B. Card.)

Q. Mr. Card, you have in your hands Exhibits 31 and 32. State in a general way what they are.

A. Exhibit 31 includes invoices to Marine Electric Company covering deliveries in the month of January, 1942.

Q. Now then, Exhibits 30 and 31, you refer to them as invoices. Those are not the original invoices, are they? A. No, these are copies.

Q. When were they made up?

A. Yesterday.

Q. In relation to the originals?

A. Those were made up yesterday.

Q. From what data? Where did you get your data for making up those?

A. From the original data that the original invoice was made from, or from a copy—copied from the original invoice.

Q. And how are they retained in your file?

A. In numerical order.

Q. And made up in book form?

A. And they are put on a post binder and in numerical order. [149]

Q. Post binder. Well, what you have in your hand is Exhibit 31. That is a copy from the carbon copy of the original invoice; is that correct?

A. Not a carbon copy. It is a—

Q. No. Wait a minute. It is made from a carbon copy of the original, isn't it?

A. That is right.

Q. Yes. That is, what you have in your book

(Testimony of Dean B. Card.)

where you keep them in numerical order, that is a carbon copy, is it not? A. It is.

Q. Yes. And Exhibit 31 is a copy made from the carbon copy; is that correct??

A. That is right.

Q. And made by whom? A. By me.

Q. Personally? A. Personally.

Q. You know that that is an accurate reproduction of the invoices as reflected by your original records? A. Exactly.

Mr. Henderson: Yes. I offer in evidence, if the Court please, Exhibit 31.

The Court: And what is 32?

Mr. Henderson: 32 is a group of our invoices for another month. [150]

The Court: What month?

Mr. Henderson: The month of March.

The Court: Take them both down to Mr. Wagner.

Mr. Henderson: I offer both of them in evidence.

Mr. Wagner: The objection is that they are not determinative of any prices that are in this controversy here and as such are incompetent, irrelevant and immaterial; that there is no evidence to establish the fact that this purchaser is one in the same class as any other purchaser involved in this controversy. We have no objection as to their authenticity.

The Court: Well, you always are very fair. I admire you for being distinct like that. But passing

(Testimony of Dean B. Card.)

whether they are of the same class, they would have a bearing, wouldn't they?

Mr. Wagner: No, your Honor. I tried to make that clear a short while ago in the difference in the method of pricing that is being used here.

The Court: You mean per——

Mr. Wagner: Per each casting and not per pound of the casting.

The Court: Well, passing that question also, if from your point of view they were priced the same, and this purchaser was in the same class, they would have a bearing?

Mr. Wagner: There still is the question of whether or not the casting is substantially the same casting.

The Court: Well, passing that—— [151]

Mr. Wagner: Well, those are the grounds of the objection.

The Court: Yes; I understand; but passing all of those things, they would have a bearing on the statute and regulation, wouldn't they?

Mr. Wagner: Yes, that is true, as to the point of time only.

The Court: As to what?

Mr. Wagner: As to the point of time, excluding——

The Court: Yes.

Mr. Wagner: ——excluding, of course, all the other things.

The Court: I understand. But how would they

(Testimony of Dean B. Card.)

work, laying those other questions aside? I want the benefit of your calculation.

Mr. Wagner: Well, those are about the only questions, as far as pricing is concerned, your Honor. As to Regulation 244 they can't apply.

The Court: Cannot?

Mr. Wagner: They cannot apply.

The Court: Why?

Mr. Wagner: Because of the requirement that the subsequent pricing be maintained on a per customer basis.

The Court: 244?

Mr. Wagner: Yes; M. P. R. 244.

The Court: I never heard your side of that. I want to hear you now. [152]

Mr. Wagner: As to General Price Maximum Regulation they would probably have some hearing.

The Court: They would, wouldn't they?

Mr. Wagner: Yes. That is, the March, 1942, deliveries would have some hearing; that is, assuming you could say the price was the same and the class of purchaser was the same.

The Court: I think I am going to hold against you on that. That is why I wanted to see what you were willing to concede about that. What are you going to do about this class of purchaser point?

Mr. Henderson: If the Court please, that is a legal question. Here is our position about that. The courts have repeatedly held that this law was for the purpose of fixing prices but not to regulate

(Testimony of Dean B. Card.)

business; to standardize prices, to try to make a uniform price, and there was nothing in the law itself that gave—Congress never gave to the Administrator any right to do anything more than fix prices generally over all the business, and gave him at no place a right to say that if you sold to one person for a particular price you had to continue to sell to that person for a particular price. Congress didn't do that. Congress didn't delegate that power to the Administrator. Congress delegated only to the Administrator the powers to fix a general price in the industry. You read the Act all the way through, it is talking about the industry—talking about the industry all the time. [153] Whoever drew up the regulation, this second regulation, merely took the first regulation and tried to broaden it without going back to the original Act to see what the original authority was. So as far as that part of it is concerned it is entirely illegal, and we claim that the proviso that says that you have to continue a price to a particular customer, regardless of what the general price was, is beyond the power of the Administrator.

The Court: Now I get it. Let's finish the examination.

Mr. Henderson: Q. Mr. Card, I understand, or did I not understand, that you had called upon the Office of Price Administration various times to try to find out the application of the rules and regulations to your business? A. Yes.

(Testimony of Dean B. Card.)

Q. Did you ever at any time get a clear-cut statement as to what you could or what you could not do, or did you ever at any time leave their office other than in a state of bewilderment?

A. No.

The Court: Well, maybe he went there in that fix anyway.

Mr. Henderson: Q. Well, you did go there in a state of bewilderment, didn't you?

A. I did.

Q. Did you ever—were you ever able to get anyone in the office, the local office of the Price Administration, to explain [154] to you how the Maximum Price Regulation, the original Maximum Price Regulation, applied to your various systems of pricing? I mean systems of pricing; I mean pricing to one person by piece and to another person by pound, and so on.

A. No, we never did get anything straight on that.

Q. Did you ever get anything thoroughly explained to you? For instance, you got a letter from MacCormac Snow, didn't you, at one time, telling you what no to do? Or did he gave you some advice what not to do?

A. He told us what we had to do.

Q. What was it he told you you had to do?

Mr. Wagner: Just a minute.

The Court: Just to kind of work this along pretty fast, it is bearing on good faith, is all.

(Testimony of Dean B. Card.)

Mr. Henderson: Yes. And there is one other thing here. MacCormac Snow—and if they will stipulate it it is all right. It is covered by a letter anyway; MacCormac Snow told them that they could not proceed to fix a certain price, or protest a certain price, unless they paid up what they claimed was then due.

The Court: Yes. I know you have pleaded that. You go ahead and prove that.

Mr. Henderson: Do you concede that such a letter was written?

Mr. Wagner: I will concede the letter was written but [155] I am not going to concede——

Mr. Henderson: The effect?

Mr. Wagner: —that Mr. Card is in a position to testify as to the effect of that letter.

Mr. Henderson: Mark that.

(The photostatic copy of letter dated February 10, 1943, Thaddeus W. Veness, Chief Attorney, by MacCormac Snow, Chief Enforcement Attorney, to Crawford & Doherty Foundry Company, so offered, was marked Defendant's Exhibit 33 for identification.)

Mr. Henderson: I offer in evidence this letter that is being marked Exhibit 33.

The Court: State your objection.

Mr. Wagner: I would like to state an objection to the introduction of this letter, to its relevancy here. I would also like to have the record disclose—I haven't been able to find it yet—that Mr. Card

(Testimony of Dean B. Card.)

received other correspondence telling him exactly what to do in the particular situation. Evelyn Cooper's letter, do you have that?

Mr. Henderson: Yes. I offer in evidence all of these letters.

Mr. Wagner: Well, may I look at it first?

Mr. Henderson: Yes. [156]

Mr. Wagner: I don't think there is any objection but I would like to look at it. Do you have another letter from Evelyn Cooper?

Mr. Henderson: No. If you have one, show us the letter and introduce it, Counsel. We will not object to it.

Mr. Wagner: I have no objection to any of them, but I would like to have this one go in.

Mr. Henderson: Oh, yes. These ought to be your case. But mark all of these.

The Court: They will all be marked one number. There is another one coming there from Mr. Wagner.

Mr. Wagner: Letter of September 14th, 1942.

Mr. Henderson: Yes. Well, introduce that.

The Court: That goes in with the other as one number. It should be Exhibit 33.

(Pursuant to the foregoing, photostatic copy of November 9, 1942, Thaddeus W. Veness, State Attorney, by Evelyn N. Cooper, State Price Attorney, to Willamette Iron & Steel Co.; photostatic copy of letter dated April 2, 1943, Thaddeus W. Veness, Chief Attorney, by

(Testimony of Dean B. Card.)

MacCormac Snow, Chief Enforcement Attorney, to Crawford & Doherty Foundry Company; photostatic copy of letter dated March 12, 1943, Thaddeus W. Veness, [157] Chief Attorney, by MacCormac Snow, Chief Enforcement Attorney, to Crawford & Doherty Foundry Company; and photostatic copy of letter dated September 14, 1943, Thaddeus W. Veness, State Attorney, by Evelyn N. Cooper, State Price Attorney, Oregon State Office, to Crawford & Doherty Foundry Company, were attached to Defendant's Exhibit 33, which was marked received.)

DEFENDANT'S EXHIBIT No. 33

Office of Price Administration

Bedell Building

Portland, Oregon

In Reply Refer to 8410-127SF-d

February 10, 1943

Crawford & Doherty Foundry Co.

4604 S. E. Seventeenth Avenue

Portland, Oregon

Attention: Mr. Card

Gentlemen:

Your letter of February 9 is at hand. My recollection is that in November I urged you to prepare and file with the Price Division such application for adjustment as you felt entitled to, but at the

(Testimony of Dean B. Card.)

same time stated that according to the practice of the Price Division any such application could not be acted upon favorably until your company made a satisfactory adjustment on account of past violations. I still suggest filing any application you want to make with the Price Division.

Since November, however, I have been able to get more complete information about the extent of your past price violations. These violations according to my figures which I believe are entirely correct, and cover the period from August 1, 1942 to January 1, 1943, amount to \$18,185.68. This sum trebled amounts to \$54,557.04. The violations which occurred prior to August 1, 1942 amount to \$2562.77.

On account of these violations our Washington office is considering the possibility of a criminal prosecution and our San Francisco office has advised an injunction suit.

I do not recall cancelling any appointment with you nor do I remember intending or desiring to cancel any such appointment. I shall be glad to discuss with you or Mr. Stirnweis, or both of you, at any time the affairs of your company in relation to the Office of Price Administration. The situation is very bad but I still hope we may be able to find a way out. It is my chief hope that a method may be found whereby your plant, your Meehanite franchise, and your ability to turn out good castings

(Testimony of Dean B. Card.)

may continue without break to be devoted to the war effort.

Very truly yours,

THADDEUS W. VENESS

Chief Attorney

By MacCORMAC SNOW

Chief Enforcement Attorney.

MSnow/EMF

Office of Price Administration

Bedell Building

Portland, Oregon

In Reply Refer to 6F:8-4:ENC(L)

November 9, 1942

Willamette Iron and Steel Co.

350 N. E. Front Avenue

Portland, Oregon

Attention: Mr. Viken

Gentlemen:

This will confirm my telephone conversation with your Mr. Viken concerning the proper ceiling price of gray iron castings purchased from Crawford and Dougherty.

From May 11 to October 26 gray iron castings have been covered by the General Maximum Price Regulation. During that period, you have been billed by Crawford and Dougherty for castings at the price which you paid in March. Crawford and Dougherty now advises that it intends to bill you for an additional amount representing the differ-

(Testimony of Dean B. Card.)

ence between the price which you have been paying and that paid by Iron Fireman for the same castings. You asked whether this additional billing is permissible and whether you can properly pay the addition.

We have recently checked the March records of Crawford and Dougherty and found that during March it delivered an order of these castings to Iron Fireman at a higher price than the price at which it delivered to you during the same month. That being the case, and Iron Fireman being a purchaser of the same class as your Company, the ceiling price on sales to you is the price charged Iron Fireman during March. Consequently, Crawford and Dougherty can properly charge, and you may pay, the difference between your March price and Iron Fireman's under the regulation. Of course, it is a question of contract law with which we are not concerned as to whether you are legally required to pay the difference. Sales at less than ceiling prices are permissible under the regulation.

In accordance with your request, we enclose a copy of Maximum Price Regulation No. 244 on gray iron castings. Effective October 26, this regulation supersedes the General Maximum Price Regulation. Castings received after October 26 must be priced and paid for in accordance with the new regulation.

(Testimony of Dean B. Card.)

If we can be of further assistance, please communicate with us.

Very truly yours,

THADDEUS W. VENESS

State Attorney

By: EVELYN N. COOPER

(Mrs.) Evelyn N. Cooper

State Price Attorney

Enc.

District Office

Office of Price Administration

Bedell Building

Portland, Oregon

In Reply Refer to 8410-00127

April 2, 1943

Crawford & Doherty Foundry Co.,

4604 S. W. 17th

Portland, Oregon.

Gentlemen:

The Regional Office has today instructed me to the effect that you are now entitled to charge the prices requested in your application under Proce-

(Testimony of Dean B. Card.)

dural Regulation No. 6, subject, of course, to the provisions of that regulation.

Very truly yours,

THADDEUS W. VENESS

Chief Attorney

By: MacCORMAC SNOW

MacCormac Snow

Chief Enforcement Attorney

MSnow:me

cc to Regional Enforcement

Attorney

cc to Regional Administrator.

Office of Price Administration

Bedell Building

Portland, Oregon

In Reply Refer To: 8410-00127

March 12, 1943.

Crawford & Doherty Foundry Co.,
4604 S. E. 17th,
Portland, Oregon.

Gentlemen:

Your application under Procedural Regulation No. 6 was handed to the Price Division yesterday for an adjustment of the price of gray iron castings. This application cannot be acted upon to permit you to quote the prices you request in your application until you have made a satisfactory adjustment for your past overcharges.

(Testimony of Dean B. Card.)

In the mean time the Price Division permits me to say that they have already started to make an analysis of your application.

Very truly yours,

THADDEUS W. VENESS

Chief Attorney

By: MacCORMAC SNOW

MacCormac Snow

Chief Enforcement Attorney

Ms:me

Office of Price Administration

Bedell Building

Portland, Oregon

In Reply Refer to 6F:8-4:ENC(L)

September 14, 1942

Crawford & Doherty Foundry Co.

4604 Southeast 17th Avenue

Portland, Oregon

Attention: Mr. Card

Gentlemen:

This will confirm my telephone conversation with you concerning the proper price of gray iron castings on sales to Willamette Iron & Steel Co. and The Iron Fireman.

During 1941 you entered into a contract with Willamette Iron & Steel Co. for the sale of gray iron castings and during March 1942 made deliveries under that contract. Early in 1942 you took an order from The Iron Fireman for castings

(Testimony of Dean B. Card.)

at higher prices but made no deliveries on that order until after March.

You claim that you can not continue to manufacture gray iron castings at the contract price and ask whether you can sell to Willamette Iron & Steel Co. at The Iron Fireman price.

The ceiling price on sales to Willamette Iron & Steel Co. and The Iron Fireman, both, is the contract price at which you made deliveries to Willamette Iron & Steel Co. during March. This price can be increased only on the basis of an application for adjustment.

Since the castings in question are produced for installation in ships being constructed under contract with the Government, you would qualify for adjustment under Procedural Regulation No. 6. This Regulation permits you to sell at the increased price requested to be established as the ceiling upon the filing of the application. It is my understanding that you have copies of this Regulation.

Very truly yours,

THADDEUS W. VENESS

State Attorney

By: EVELYN N. COOPER

(Mrs.) Evelyn N. Cooper

State Price Attorney

Oregon State Office

(Testimony of Dean B. Card.)

Cross Examination

By Mr. Wagner:

Q. Mr. Card, referring to Exhibit 29, the letters that were purportedly written by myself to the three concerns, the Willamette Iron & Steel——

The Witness: I didn't hear that first.

The Court: You know what they are; the letters from Mr. Wagner to the three companies.

The Witness: Yes.

Mr. Wagner: Q. It is a fact, Mr. Card, that the figures and the quotations that were set forth in those letters were furnished me by yourself, in my office; is that not a fact?

A. Not entirely.

Q. Well, will you explain.

A. They were taken, some of these figures were taken from [158] your photostat copies of Mr. Fox' sheets where he had made these investigations.

Q. And I am talking about the withheld amounts.

A. The withholding is from my records.

Q. From your records. And all of those figures were supplied us, and particularly so pursuant to negotiations for settlement of this controversy; isn't that true?

A. Pursuant to a proposed settlement?

Q. That is true, is it not?

A. That is right.

Mr. Henderson: Would Counsel care to state to the Court now whether any of those companies that received those letters from your office denied the amounts?

(Testimony of Dean B. Card.)

Mr. Wagner: I have never heard from them.

Q. Mr. Card, you are still maintaining your raised price structure in connection with their four accounts, are you not?

Mr. Henderson: I object to that as incompetent, irrelevant and immaterial. It has nothing to do with the issues in this case.

The Court: He may answer, subject to the objection. Are you maintaining the raised prices?

A. We didn't raise any prices.

Mr. Wagner: Q. Didn't you in April in 1942?

A. Pardon?

Q. You raised your prices in April of 1942?

[159]

A. Yes. Those prices we have maintained.

Q. You have maintained them ever since?

A. That is right.

Q. You are still charging them to your customers?

A. That is right.

Q. And you intend to continue charging those prices?

Mr. Henderson: If the Court please——

Mr. Wagner: Well, I can call him as my own witness, Mr. Henderson, if I want to ask him this question.

The Court: He may answer. So far as you know—you are not running the business, though, are you?

The Witness: Pardon?

The Court: You don't run the business, do you?

(Testimony of Dean B. Card.)

A. Not entirely, no.

The Court: No.

Mr. Wagner: Q. Did you make a computation of the total amount of business done with Marine Electric Company in the period March of 1942, from invoices? A. Yes.

Q. How much business was it?

A. Forty-four hundred and some odd dollars.

Q. From those invoices? A. Yes, sir.

Q. In March of 1942 to Marine Electric Company?

A. I believe it was forty-four hundred and four dollars. [160]

Q. How about January of 1942? Did you make a computation of the total amount done with Marine Electric in January, '42? A. Yes.

Q. How much was that?

A. One hundred eighty dollars.

Q. \$180.00? A. That is right.

Mr. Wagner: I think that is all.

(Witness excused.)

Mr. Henderson: That is our case.

The Court: Rebuttal, Mr. Wagner. Finish.

Mr. Wagner: Call Mr. Lamp.

REBUTTAL

H. M. LAMP

was thereupon produced as a witness in rebuttal in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wagner:

Q. State your name, please.

A. H. M. Lamp.

Q. What is your occupation, Mr. Lamp?

A. Production Manager of the Marine Electric Company.

Q. How long have you been so employed? [161]

A. By the company or in that position?

Q. Well, by the company.

A. Since April 5th in '43.

Q. Since April 5th in 1943? A. 1943.

Q. Are you familiar with records of the concern covering the transactions during the latter part of 1941 and '42? A. No, sir.

Q. You are not? A. No.

Q. Is your concern now purchasing castings from Crawford & Doherty Foundry Company?

A. Yes, sir.

Q. What type of castings are those?

A. Pardon?

Q. What type of castings are they?

A. At the present time mostly small motor castings.

(Testimony of H. M. Lamp.)

Q. When you say small motor castings, what do you mean by that??

A. Well, we build motors from 5 to 20 horse power; also build steam engines.

Q. How big is the motor from 5 to 20 horsepower?

A. Oh, approximately 20 inches in diameter for 20 horse, and about 15 inches for a 5.

Q. Approximately what would those castings weigh, on an [162] average?

A. Various castings. They will vary anywhere from two pounds to a hundred.

Q. Are you familiar with the extent of the business that Marine Electric is doing now with Crawford & Doherty?

A. Yes.

Q. How much does that run, on a per month basis?

A. You mean average for, say a year?

Q. Yes.

A. Oh, I should judge probably the last year in the neighborhood of two thousand, maybe twenty-five hundred dollars a month.

Q. Twenty-five hundred dollars a month?

A. Two thousand or—I wouldn't know without looking it up. Approximately that.

Q. And has that prevailed during the last year, too, during 1943?

A. I should judge so, yes.

Mr. Wagner: That is all.

Mr. Henderson: No cross.

(Witness excused.)

N. P. JOHN

as thereupon produced as a witness in rebuttal
behalf of the plaintiff and, having been first duly
sworn, testified as follows: [163]

Direct Examination

By Mr. Wagner:

Q. Will you state your name?

A. N. P. John.

Q. What is your occupation, Mr. John?

A. Accountant for the Marine Electric Com-
pany.

Q. How long have you been there?

A. Three years.

Q. About three years. You started when, about?

A. December 10th, 1941.

Q. 1941, December 10th. You are familiar with
the volume of business the Marine Electric has
done with Crawford & Doherty during your employ-
ment?

A. Yes, somewhat.

Q. What was the volume of business during De-
cember of 1941, do you recall?

A. I am afraid I couldn't recall that.

Q. Do you recall there was any?

A. I was not working as the accountant at that
time.

Q. You were what?

A. I was not working as account for Marine
Electric at that time.

Q. Oh, I see. When did you start as accountant?

A. In March of '44.

(Testimony of N. P. John.)

Q. March o f '44? [164]

A. Yes.

Q. Are you familiar with the records extending back to 1942, the beginning of 1942?

A. To an extent, yes.

Q. You haven't made any accurate computation of them? A. No, I haven't.

Mr. Wagner: I think that is all.

Mr. Henderson: That is all.

Mr. Wagner: Thank you for coming.

(Witness excused.)

Mr. Wagner: Call Mr. Fox.

GLEN FOX

was thereupon recalled as a witness in rebuttal in behalf of the plaintiff and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Wagner:

Q. Mr. Fox, during your investigation of the Crawford & Doherty Company transactions did you have occasion to discuss the situation with Mr. Card at various times? A. Yes, sir.

Q. Do you recall about when you first discussed this situation with Mr. Card?

A. Well, I don't recall just when the case started. It must [165] have been around June or July, 1942.

Testimony of Glen Fox.)

Q. At that particular time did you discuss the question of various classes of purchasers of the Crawford & Doherty Foundry Company with Mr. Card?

A. Yes, sir.

Q. And what did Mr. Card tell you in connection with that situation?

A. Well, that they made the same kind of castings for Iron Fireman as they did for Willamette Iron & Steel, but they made a different kind of casting for Bingham Pump and a different kind of casting for Tuerck MacKenzie.

Q. Did Mr. Card mention Marine Electric Company to you at that time?

A. I don't—I don't think so.

Q. Did you confer as to any other purchasers of the Crawford & Doherty Foundry Company?

A. Yes, sir.

Q. In what manner?

A. Well, after we had picked up the four ones discussed here, the Tuerck MacKenzie, Bingham Pump, Willamette Iron & Steel and Iron Fireman, I asked him if there were any further, and he had also mentioned before the account of the American Iron Company. We threw that out because it was illegible, and he said——

Q. When you say "We threw that out", what do you mean? [166]

A. I say, we didn't use that.

Q. You are talking about you and Mr. Card?

A. I think the O.P.A. did that.

Q. O. K.

(Testimony of Glen Fox.)

A. And he said that other, at least I understood that other accounts that they had were small accounts, more or less like the American Can account.

Q. Did he mention to you the Marine Electric Company at any time?

A. I think at one time I asked him about Marine Electric, but I have forgotten now what he said.

Q. When did Mr. Card, to your knowledge, first contend that the Marine Electric Company was in the same class of purchaser as one or all of the other four that are involved here?

A. I don't think he ever contended that to me.

Q. Never breached that to you at all?

A. No.

Q. At any time? A. No.

Q. During your investigations? A. No.

Mr. Wagner: You may cross examine.

Mr. Henderson: No cross examination.

The Court: Have you investigated other foundries in town?

A. Just as a helper on some of the others. [167]

The Court: Well, how does this Crawford & Doherty compare in size?

A. Well, it is pretty good—

The Court: To those you know about?

A. Yet I wouldn't have any way of answering that.

The Court: All right.

(Witness excused.)

Mr. Wagner: That is our rebuttal, your Honor.

The Court: Is there anything you want to talk about that we haven't talked about as we have gone along, or that we didn't discuss previously? Are there any points, I mean, I should give consideration to that have not been impressed on me previously, either here or at pre-trial?

Mr. Wagner: I have none, your Honor.

Mr. Henderson: I don't believe so, your Honor. This is not a direct answer to your question, but I think there is one thing that for your convenience ought to be straightened out by counsel, and that is the bill of particulars.

Mr. Wagner: Oh, I am sorry. I have an explanation of that.

Mr. Henderson: I was talking with counsel for the Government this morning and I think we ought to revise that some way or other.

Mr. Wagner: There were some items that were included in the bill of particulars that indicate the invoices to be [168] dated on or subsequent to November 26th.

The Court: I am sure I don't need to give attention to that in the view that I take of the case. Mr. Wagner, what is the name of that San Francisco gentleman, McTernon?

Mr. Wagner: McTernon.

The Court: Spell it.

Mr. Wagner: M-c-T-e-r-n-o-n.

The Court: Is he a laweyr?

Mr. Wagner: Yes.

The Court: And what was his title at the time he gave instructions to begin this case?

Mr. Wagner: Regional Enforcement Attorney.

The Court: And whom did he give the instructions to?

Mr. Wagner: Mr. McDannell Brown and myself.

The Court: And then you two gentlemen, pursuant to that instruction, began the case?

Mr. Wagner: That is right.

The Court: Under what authority did Mr. McCernon give you that instruction?

Mr. Wagner: What his authority was?

The Court: That is right; yes.

Mr. Wagner: Well, it would be the general order of delegation which previously has been considered, I think General Order No. 64.

The Court: No. 64? [169]

Mr. Wagner: I believe that is it but I am not sure.

The Court: Anyhow, a copy of it could be put in the record, and should be put in the record.

Mr. Wagner: I will arrange for that.

The Court: Is the situation, so far as attempted delegation of authority, the same as in the Wheeler case?

Mr. Wagner: Well, there is that same General Order of Delegation to the Regional Office from the Administration.

The Court: No. 64, if that is the correct number, is in the Wheeler case?

Mr. Wagner: If that is the correct number. Then the express instruction as to this case by Mr. McTernon, which are a different set of circumstances than in the Wheeler case. Then, your Honor, I just recently understood that there was another order that the Administrator had made, which has a tendency to ratify some of these previous inconsistent orders. Now I don't know whether your Honor would like to consider that or not. It would probably more apply to the Wheeler case than to this situation.

The Court: Well, we are here winding up the case now and it is about to be submitted, and if you have something more to put in here other than the order, of which the number for the present is 64, why——

Mr. Wagner: Well, I think that the General Order 64 is the one upon which Mr. McTernon can be said to have acted, [170] to the best of my knowledge.

The Court: All right. And that is the one that was presented to me and that I considered in the Wheeler case?

Mr. Wagner: That is right.

The Court: Now I don't think either one of you is going to be satisfied with what I am going to do. I am going to hold with each one of you in part, ending up with denying any recovery to the O.P.A., but I want the findings of fact to cover the very serious questions. I want to hold with Mr. Henderson and Mr. Randall on what they claim for the Marine Electric account. I want to hold

with Mr. Wagner and Mr. Joy on what they claim for M. P. R. 244, customer to customer—the customer by customer clause. So you can do your own calculating and agree on it between yourselves.

I want to hold with Mr. Henderson and Mr. Randall on the good faith defense, and I want that finding written up in the language of the statute as it was amended this June.

And then I want to hold, as I did in the Wheeler case, that the case was brought without lawful authority and, therefore, all recovery is denied.

I want the record made up in that way, so that anybody else looking at it can do something else with it if they want to.

Now I don't know whether each side wants to get up [171] its own full findings in support of its full contentions, leaving it to me to pull them apart and compose them in this way that I have indicated, or whether you want each on his side to get up the findings on the issues on which I am holding with him. Do it just as you may please yourselves about that. Agree between yourselves about that.

Mr. Henderson: Yes.

The Court: And do it right away, please, because I have to go away.

Mr. Wagner: If your Honor please, there has been no pre-trial order in this case.

The Court: No. We will consider this case having been tried with the benefit of pre-trial conferences but without having completed the pre-trial.

Mr. Wagner: Very well, your Honor. Then for the purposes of the record, in connection with the

last remark by Mr. Henderson as to the bill of particulars, I would like to have the record show the deliveries in those particular instances, the date of the invoices were subsequent to October 26th but that the deliveries had been made before October 26th, 1942, even though the invoices were dated on——

The Court: I will leave you to finish your discussions on that. I think I have done all I can do.

(Thereupon, at 11:34 o'clock A.M., court was adjourned.) [172]

Wednesday, December 20, 1944, at the hour of 10:00 o'clock A.M., further proceedings were had herein, as follows:

Mr. Henderson: May it please the Court, counsel for the Government and counsel for the defendant in the case of Bowles versus Doherty, Civil 2124, have conferred in respect to Findings of Fact and Conclusions of Law. In fact, the attorney for the Government submitted to us a proposed set of Findings and Conclusions, a part of which we adopted and a part of which we changed and have served upon counsel for the Government, and it is our understanding, although he does not agree as to any finding being made that is adverse to the Government, I understood him to say that he considers that that does correctly interpret your Honor's ruling. Then he also prepared a form of

order of dismissal which is acceptable to us, and we are now submitting it, if the Court please.

Mr. Wagner: Your Honor, in connection with the findings, the portion which Mr. Henderson and I did not agree upon concerned the amounts of money which the purchasers of Crawford and Doherty Foundry Company have been withholding for a period of time. Now, at the conclusion of the trial no specific finding was made by your Honor in connection with those amounts.

The Court: I don't see that that is material to the decision, but I will be glad to hear both of you.

Mr. Wagner: I objected to them going into the findings [173] particularly for that reason, your Honor, and now Mr. Henderson has been quite insistent that they go in.

The Court: It bears on the good faith.

Mr. Henderson: Yes, and even further than that.

The Court: I will hear you in a minute.

Mr. Wagner: One other matter, your Honor,——

The Court: And you can't agree as to the amount?

Mr. Henderson: Yes, we do.

Mr. Wagner: Yes; there is no disagreement as to the amount.

The Court: All right.

Mr. Wagner: It is merely as to whether or not those amounts should go into the findings.

The Court: Well, as to whether that is a pertinent finding.

Mr. Wagner: That is right.

The Court: To that you don't agree.

Mr. Wagner: That is right. Now, one other matter that I wish to have into the record: That was in connection with the authority as delegated by the Administrator to the Regional Chief Enforcement Attorney to institute actions. My recollection is that I named it General Order No. 64 during the course of the trial.

The Court: If my recollection is correct, we weren't sure of the number. We called it by provisional numbers. [174]

Mr. Wagner: That is correct. I now have them, and I would like to have the record show that the order is Revised General Order No. 3, 8th Federal Register, page 8027, which was issued and effective on the 10th day of June, 1943; also Second Revised General Order No. 3, which was issued and became effective on September 7, 1944. This Second Revised General Order includes, in addition to the previous orders, a provision for the ratification by the Administrator and approval of the institution of any preceding actions that were brought——

The Court: I hope I didn't have anything to do with that Revised Order Number Two.

Mr. Wagner: Well, I am not at all aware of what the circumstances were, your Honor, in the issuing of that order, but I did want them included in the record at this time.

The Court: Well, I will want to look at it, of course. That is new to me. That is the first time I have heard of this ratifying order in any of the cases, and I think it is entirely proper for you to

put them in now, because you all reserved your right to put in such orders as you relied upon as your authority, and these two may be given exhibit numbers in their order.

(The two documents referred to, so offered and received, were thereupon marked as follows: Copy of Revised General Order 3 was marked received as Plaintiff's Exhibit 34; and [175] Copy of Second Revised General Order 3 was marked received as Plaintiff's Exhibit 35.)

PLAINTIFF'S EXHIBIT NO. 34

Federal Register, Volume 8, Number 116, Washington, Saturday, June 12, 1943, page 8027:

“Rev. Gen. Order 3

“REPRESENTATION OF ADMINISTRATOR IN COURT PROCEEDINGS SERVICE OF PROCESS

“General Order No. 3 is revised and amended to read as follows:

“Pursuant to the authority conferred upon the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Orders 9125, 9250, 9280, and 9328, the following order is prescribed:

“(a) Institution of and intervention in civil proceedings. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, the Regional Attorneys or the Acting Regional Attorneys, and

the Regional Enforcement Attorneys, or the Acting Regional Enforcement Attorneys, are each authorized to institute and intervene in appropriate civil actions or proceedings, in the name of the Price Administrator; and any of them may authorize any other attorney employed by the Office of Price Administration to institute or intervene in appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

“(b) Service of process upon the Administrator. Service of process upon the Price Administrator may be made by serving him personally, or by leaving a copy thereof at the Office of the Secretary, Office of Price Administration, Washington, D. C. No other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, is authorized to accept service of process on behalf of the Price Administrator or enter his appearance in any action or proceeding except as herein provided.

“(c) Appearance for the Administrator in defensive suits. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, and the Assistant General Counsel or the Acting Assistant General

Counsel in charge of the Court Review, Research and Opinion Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any action or proceeding instituted against the Price Administrator or the Office of Price Administration in the Emergency Court of Appeals and in proceedings for the review of determination of the Emergency Court of Appeals in the Supreme Court; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any such action or proceedings. The General Counsel or the Acting General Counsel, and the Director of the Enforcement Division or the Acting Director are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any other action or proceeding instituted against the Price Administrator or the Office of Price Administration; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any other such action or proceeding.

“Issued and effective this 10th day of June 1943.

“GEORGE J. BURKE,
Acting Administrator.

“F. R. Doc. 43-9454; Filed, June 10, 1943;
3:51 p.m.)”

PLAINTIFF'S EXHIBIT NO. 35

SECOND REVISED GENERAL ORDER 3

Revised General Order No. 3 is revised and amended to read as follows:

Pursuant to the authority conferred upon the Price Administrator by the Emergency Price Control Act of 1942, as amended, the Act of June 28, 1940 (54 Stat. 676) as amended, and Executive Orders 9125, 9250, 9280, and 9328, the following order is prescribed:

(a) Institution of and intervention in civil proceedings. The General Counsel or the Acting General Counsel, the Deputy Administrator in Charge of Enforcement, or the Acting Deputy Administrator in Charge of Enforcement, the Director of the Litigation Division or the Acting Director of the Litigation Division, the Regional Enforcement Executives or the Acting Regional Enforcement Executives, the Regional Litigation Attorneys or the Acting Regional Litigation Attorneys, the District Enforcement Attorneys or the Acting District Enforcement Attorneys are each authorized to institute and/or intervene in, and to conduct appropriate civil actions or proceedings, in the name of the Price Administrator; and any of the foregoing may authorize any other attorney employed by the Office of Price Administration to institute and/or intervene in, and to conduct appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of

Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

The Price Administrator does hereby ratify, approve and confirm all acts done and all proceedings had or taken by an attorney-at-law regularly admitted to practice in any state, territory, or district, purporting to act in the name of or on behalf of the Price Administrator in any suit, action or proceeding heretofore at any time brought or purporting to be brought by the Price Administrator in any court of the United States or of any state, territory or district, said ratification, approval and confirmation to have the same force and effect as if specific authority to institute and conduct such suit, action or proceeding had been expressly granted by the Price Administrator to such attorney immediately prior to the commencement of such suit, action or proceeding. Without in any manner limiting the generality of the foregoing, the Price Administrator does hereby ratify, approve and confirm all acts done and all proceedings had or taken by any such attorney in instituting, maintaining and prosecuting any and all suits, actions and proceedings of whatsoever nature heretofore at any time brought or purporting to be brought in the name of the Price Administrator under the provisions of section 205(a) of the Emergency Price Control Act of 1942 to enjoin violations of said act or any order, schedule or regulation thereunder, or

under the provisions of section 205(e) of said act as originally enacted, or as amended, to enforce any liability created by said section or under the provisions of section 205(f) of said act to revoke the license of any person licensed under said act, or under section 202 of said Act to enforce compliance or obedience to any subpoena, order or requirement issued or purporting to be issued under said section, or under subdivision 6 of subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676) as amended, to enforce compliance with, or obedience to, or to enjoin violations of, or to enforce any liability or duty created by, any rule, regulation, order, or subpoena issued under said subsection (a).

CHESTER BOWLES

Administrator Office of Price
Administration

Issued 9-7-44, 9 FR 11137 (effective 9-7-44)

The Court: Have you finished?

Mr. Wagner: Yes, your Honor.

The Court: Have you read this, Mr. Henderson?

Mr. Henderson: Yes, I have, your Honor.

The Court: Have you read the ratifying order?

Mr. Henderson: Yes, I have, your Honor. Well, as far as admissibility, I am sure we had contended merely because we consider that it doesn't have any legal efficacy, the fact that it goes in as an exhibit doesn't add to its efficacy as controlling orders.

The Court: No; what we are getting at is, does it improve the position of the plaintiff as to the authority?

Mr. Henderson: Well, I assume this, that if the Government brings an action for a penalty and assumes to do something, unless they have power to do it at the time nobody can ratify something that has been done. I just assumed, even without trying to follow it through, if it has to do with any proceeding that has to do with a penalty, you can't ratify something, you can't bring it into life for the purpose of the action here. The statute of limitations would run on this, you see, nominally.

The Court: Now, that is something. When was this case brought? [176]

Mr. Henderson: This was July, '42.

The Court: When was the case brought?

Mr. Wagner: '43?

Mr. Henderson: July, '43.

The Court: July, '43?

Mr. Wagner: That is right.

Mr. Henderson: And they brought it within—they just had, I believe, about thirty days in which to bring it, if I am not mistaken.

Mr. Wagner: That is right.

Mr. Henderson: Now, then, if they couldn't bring it within thirty days later, obviously nobody after the time the limitations had expired could breathe life into something that didn't exist at that time. Now, without even trying to analyze the effect of it, that was my conclusion with regard to the efficacy of it.

The Court: The new matter of this Revised General Order No. 3, Mr. Wagner, appears to be the second paragraph of (a)?

Mr. Wagner: Yes, that is right.

The Court: The first paragraph is entitled, "Institution of and intervention in civil proceedings". Is that the same as in the original file?

Mr. Wagner: I believe so, yes.

The Court: Now, I am just trying to read out loud, and you can copy it from the order a little later, if you want to: [177]

"The Price Administrator does hereby ratify, approve and confirm all acts done and all proceedings had or taken by an attorney-at-law regularly admitted to practice in any state, territory, or district, purporting to act in the name of or on behalf of the Price Administrator in any suit, action or proceeding heretofore at any time brought or purporting to be brought by the Price Administrator in any court of the United States or of any state, territory or district, said ratification, approval and confirmation to have the same force and effect as if specific authority to institute and conduct such suit, action or proceeding had been expressly granted by the Price Administrator to such attorney immediately prior to the commencement of such suit, action or proceeding. Without in any manner limiting the generality of the foregoing, the Price Administrator does hereby ratify, approve and confirm all acts done and all proceedings had or taken by

any such attorney in instituting, maintaining and prosecuting any and all suits, actions and proceedings of whatsoever nature heretofore at any time brought or purporting to be brought in the name of the Price Administrator under the provisions of Section 205(a) of the Emergency Price Control Act of 1942 to enjoin violations of said act or any order, schedule or regulation thereunder, or under the provisions of Section 205(e) of said act as originally enacted, or as amended, to enforce any liability created by said section"—that, [178] Mr. Wagner, is the three times the overcharge?

Mr. Wagner: Yes, 205.

The Court: "—or under the provisions of Section 205(f) of said act to revoke the license of any person licensed under said act, or under Section 202 of said Act to enforce compliance or obedience to any subpoena, order or requirement issued or purporting to be issued under said section, or under subdivision 6 of sub-section (a) of Section 2 of the Act of June 28, 1940 (54 Stat. 676) as amended, to enforce compliance with, or obedience to, or to enjoin violations of, or to enforce any liability or duty created by, any rule, regulation, order, or subpoena issued under said sub-section (a)."

I wonder if this was put in the Federal Register?

Mr. Wagner: Yes, I think the notation is at the conclusion.

The Court: Yes, "Issued 9-7-44, 9-FR 11137 (effective 9-7-44)."

Now, in this Crawford and Doherty case the acts complained of were committed in 1942?

Mr. Wagner: 1942, and——

Mr. Henderson: Up to March, 1943.

Mr. Wagner: Yes, some in the early part of '43. Up to March 10th, I believe.

The Court: The statute of limitations is a year, isn't it, in this Price Control Act? [179]

Mr. Wagner: That is right, your Honor.

The Court: Why wouldn't he have had a year?

Mr. Wagner: The transactions that occurred that were involved in the action commenced occurring on August 1st of 1942. Our action was instituted, I believe, very close to the end of July in 1943.

The Court: Why wouldn't you have had a year from March, '43?

Mr. Wagner: Well, considering each transaction, together with the language of the previous act, which I believe commenced the statute running from the completion of the delivery date, would, of course, bar a right of action, of any transaction at which the delivery was more than one year prior hereto.

The Court: There wasn't a delivery after——

Mr. Wagner: That is right, there were a large number of deliveries continued over the period of time.

The Court: That statute of limitations to which you raise question, Mr. Henderson, only applies to part?

Mr. Henderson: That would have expired in March, 1944, and this didn't go into effect until September, 1944, so still what I said did relate to the first part, yes, but, in any event, none of it was within the statute of limitations. That is, the statute of limitations would have expired—they must have brought the action, in any event, not later than March, [180] 1944, and this ratification didn't take place until September.

The Court: Mr. Reporter, will you transcribe what has been said this morning and see that it is included in the other proceedings in this case.

All right, Gentlemen,—

Mr. Henderson: I want to be heard on the reply. To get before your Honor what we had in mind, let me read a part of VIII. The first part of VIII is as was originally written by counsel for the Government:

“The Court finds that on or about the 13th day of April, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Company to prices above those theretofore charged said respective purchasers for similar castings; that in the early part of November, 1942 defendant entered into an arrangement with the aforesaid respective purchasers to render invoices for castings delivered to them after that time upon the basis of the increased price schedule, but that notwithstanding such invoices it was understood that such purchasers would pay only upon such invoices the amount de-

terminated by computation on the original or unrevised price schedule, or on the basis of the prices prevailing before the increase, and that the excess or difference between the amount shown by the invoice and the amount paid would be retained by such purchaser pending the determination of the validity of the increased price schedule; that since the early part of November, [181] 1942 the defendant has continued, during the time referred to in Plaintiff's complaint, to render to the aforesaid purchaser invoices and to make deliveries and receive payment in pursuance of the foregoing agreement."

Now, let's assume we had, not the order dismissing this, but the question on the right to a determination as to whether or not we have violated the price schedule. If we have not collected, and if our agreement is specific that we are not going to take that money, if it is ultimately determined that the price schedule, our increased price schedule, is invalid, we can't collect the money, so how is the sale made? You can't say that the sale is made on the increased price schedule. You have to say that the sale is made on the basis of the original price schedule, contingent, however, that we may recover, if the other is determined to be effective, the increased price schedule.

Now, I know the position of counsel. They take the position that even the rendering of invoices makes us liable, but that can't be the meaning of the law; that can't be the meaning of the law, be-

cause you can't change the law of contracts. If I deliver something to a man and say, "Here, I am going to charge you this and let you pay this. However, understand, if I am permitted to charge this increased price you are going to have to pay that."—Now, then, your Honor has determined that we didn't establish this right to the increased [182] price schedule, therefore, we can't in an action at law recover from any of these people this amount of money, so we have been paid according to the original price schedule and we can't collect the rest of the money.

Well, now, was it contemplated that we would pay a penalty on something when we haven't collected the money on it? Now, supposing you had to render a judgment here, do you say that we can't collect a difference, this excess, it is still in the hands of these people and we never can collect, yet we must pay to the Government the difference? If so, why?

Now, it is our contention that we have established this. As a matter of fact, there wasn't any question about this. This is undisputed as far as the evidence is concerned. This is a fact. If by any chance the Court should reverse this Court on the basis of the ground of dismissal that they didn't have the right to bring the suit, we are then back in court on the question of this price; we won't have that court, to say, "Here, we want you to consider whether we have made a sale or not. These are the facts," and we think we are entitled to have

that in there, in view of the fact that it was undisputed as far as the evidence was concerned.

Mr. Wagner: First, your Honor, the evidence that was used in order to establish this was a letter that was written by myself to three of the purchasers based upon figures that Crawford and Doherty had given to us, given to our office, the [183] purpose of those letters being to have confirmations from the three purchasers as to the facts in connection with the withheld funds. There were no confirmations that ever came from any of the purchasers. The objection that was directed to the testimony and that evidence was based upon the fact that the evidence, that much evidence, was not admissible to establish the fact of the withholdings. Further, it is certainly my understanding that it was not entirely a purpose of withholding. It was one wherein, after some period of time, after payment had been made for a great number of these transactions, then certain amounts were offset as against the excessive or illegal charges that previously had taken place. Now, those offsets were carried on over some period of time, and just exactly what the status of each of those accounts is does not appear in the record, other than the figures as indicated by those particular letters, which we feel are not evidence of the agreement nor of the amounts withheld at all.

Now, in connection with the other point that counsel makes, of course I think that if a sale and de-

livery is made and that consideration passes, there isn't any question about it. If the price is illegal, that the claim exists. If merely the commodity or the items are delivered and a billing is made for it and no payment whatsoever is made, then counsel might have some ground for argument, but that was not the case, in any event, under these circumstances, that is, the ones in this [184] case, and, therefore, I think that the inclusion of that part of the defendant's testimony and the evidence which was adduced is certainly not properly included in the findings.

The Court: Didn't you argue in an earlier case—contend, rather, that the act was violated where the charge was made, even though the account had not been paid?

Mr. Wagner: I don't recall having argued that, your Honor. That has been the position of the Office of Price Administration consistently, however, and if that were the case here I would so argue, but that is not the case here, and the evidence upon which this finding is predicated we believe is not sufficient to warrant it.

The Court: Well, isn't it sufficient to warrant it because of the pertinency to the defense administration?

Mr. Wagner: I don't see how it can be argued. Most assuredly, all of the deliveries and the invoicing at the excessive prices were known to be in violation of the price ceilings that the Crawford and Doherty Foundry Company were bound to, and

that the continuation of that practice, known to be in violation of the Price Act and the regulations, and objected to by the Office of Price Administration at the time, could not be said to be in good faith, I don't believe.

The Court: Well, I am not asking you to commit yourself at all to the proposition that the good faith statute was established here by this alone or in combination with any other. [185] All I want to know is if you are willing to go along—or I won't press you to say that, even—that this has some bearing on the question of good faith. It would be for another court to say whether it had application otherwise.

Mr. Wagner: Well, as I say, my answer to that question was necessarily qualified. If there were other circumstances present, such as the fact that the vendor didn't know what his price ceilings were, or didn't know that his sale was controlled by regulation, and in order to be sure of himself didn't make a charge at the time of delivery or at any time until he ascertained what his ceiling was, there is another question, but those circumstances aren't present in this case at all.

The Court: I know. Thank you. I will work this up right soon.

Mr. Henderson: Of course, there is one thing on which counsel is in error, when he says that was the only testimony. That was cumulative. There were letters. Mr. Cord and Mr. Stirnweis testified positively to this.

The Court: I think I shall just include the finding.

Mr. Wagner: There was one other matter: There was no mention of any finding at the conclusion of the trial on the question of injunction.

The Court: That is right, there was an injunction asked for, too, wasn't there?

Mr. Wagner: Yes. [186]

The Court: That slipped my mind. Well, is the judgment order broad enough to cover that? The judgment is for the defendant.

Mr. Wagner: The judgment is merely one of dismissal on the one particular ground.

The Court: Regardless of the ground, that relief prayed for would fall with the dismissal generally.

Mr. Wagner: That was my assumption.

The Court: All right, all right, that clears it up, then.

(Whereupon proceedings herein on December 20, 1944 were concluded.) [187]

[Title of District Court and Cause.]

REPORTERS' CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had and evidence given upon the trial of the case wherein Chester Bowles, Administrator, Office of Price Administration, is plaintiff, and Crawford and Doherty

Foundry Company, an Oregon corporation, is defendant, Civil No. 2124, before the Honorable Claude McCulloch, Judge, on December 12 and 13, 1944; that I have prepared a transcript from my shorthand notes, and the foregoing and hereto attached 172 pages of transcript, numbered 1 to 172, both inclusive, contains a full, true and correct record of all of the proceedings had and evidence given upon said trial.

I, Cloyd D. Rauch, certify that I reported in shorthand on December 20th, 1944, beginning at 10:00 o'clock A. M., the further proceedings concerning the Findings and Conclusions of law, and hereafter reduced the same to typwriting, and the proceedings set forth in pages 173 to 187, both inclusive, are [188] the actual proceedings reported by me.

In Testimony Whereof, We have hereunto set our hands, this 6th day of March, A. D. 1945.

ALVA W. PERSON

CLOYD D. RAUCH [189]

[Endorsed]: No. 11025. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Crawford and Doherty Foundry Company, an Oregon corporation, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 3, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11025

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

v.

CRAWFORD & DOHERTY FOUNDRY COM-
PANY,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action
the appellant, Chester Bowles, Administrator of the

Office of Price Administration, will urge and rely upon the following points:

1. The District Court erred in finding as a fact or concluding as a matter of law that Marine Electric Company was a purchaser of the same class as Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation and Iron Fireman Manufacturing Company.

2. The District Court erred in finding that the defendant made or entered into any of the agreements or arrangements as set forth in the findings of fact, and in failing to hold and conclude as a matter of law that even if said agreements or arrangements had been made defendant violated Maximum Price Regulation 244 by selling or delivering commodities accompanied by or under invoices showing prices higher than those permitted by said regulation.

3. The District Court erred in finding as a fact and concluding as a matter of law that the attorney or attorneys who instituted this action on behalf of appellant were without authority to do so.

4. The District Court erred in dismissing the action.

5. The District Court erred in failing to award

judgment in favor of appellant as prayed for in the complaint.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attorney
Attorneys for the Appellant

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attorney
Attorneys for Appellant.

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien,
Clerk.

Title of Circuit Court of Appeals and Cause.]

ORDER

The parties hereto having by stipulation so agreed is now by the Court

Ordered: That in printing the transcript here- the Court omit Exhibits Nos. 8, 9, 10, 15, 16, 17, 19, 21 and 25 in the Court below, but that said exhibits may be considered by this Court on this appeal as fully as though printed.

Dated: June 12, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between the above entitled parties by and through their respective attorneys that defendant's exhibits numbered 8, 9, 10, 15, 16, 17, 20, 21 and 25 may be omitted from the printed record or transcript on appeal herein but that said exhibits may still be considered by the Court as a part of the record on said appeal.

In accord with the Designation of Record herein in file, all exhibits will be contained in said printed

record on appeal, save and except as hereinabove indicated they be omitted.

HERBERT H. BENT

F. E. WAGNER

Of Attorneys for Appellant

WILBER HENDERSON

Of Attorneys for Appellee

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER THAT BILL OF PARTICULARS
NEED NOT BE PRINTED

The parties hereto having by stipulation so agreed
it is now by the Court

Ordered: That in printing the transcript herein
the Court omit the Bill of Particulars filed in the
Court below, but that said Bill of Particulars may
be considered by this Court on this appeal as fully
as though printed.

Dated: June 27, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed June 27, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated And Agreed between the parties to the above entitled appeal, by and through their respective attorneys, that the Bill of Particulars filed in the District Court in the said action and heretofore certified and transmitted to the Circuit Court of Appeals, may be omitted from the printed transcript of record and may be considered by the Court as a part of the record on the said appeal.

Dated this 12th day of June, 1945.

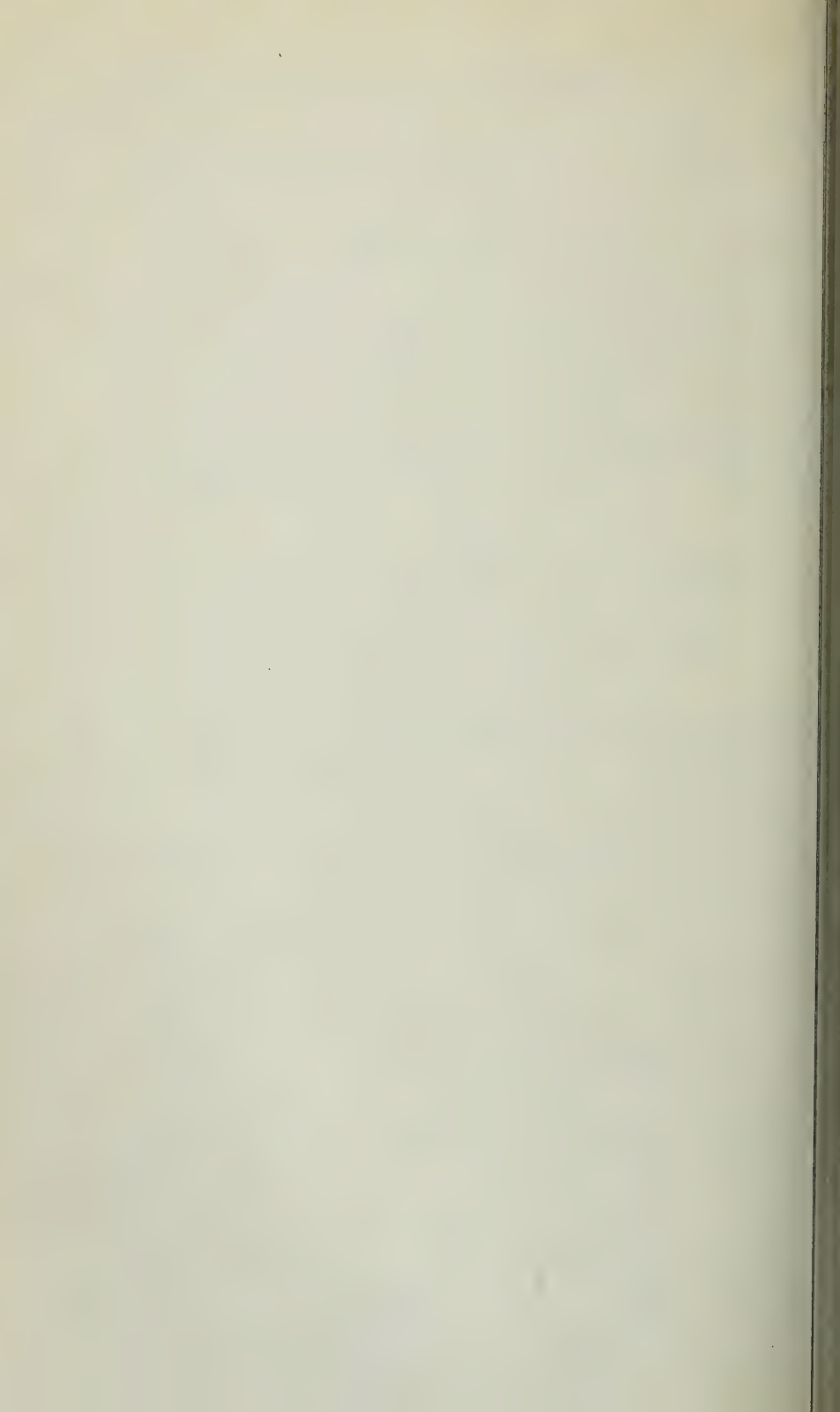
F. E. WAGNER

Of Attorneys for Appellant

WILBUR HENDERSON

Of Attorneys for Appellee

[Endorsed]: Filed Jun 27, 1945. Paul P. O'Brien,
Clerk.



No. 11025

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT**

v.

**CRAWFORD AND DOHERTY FOUNDRY COMPANY, AN
OREGON CORPORATION, APPELLEE**

APPELLANT'S BRIEF

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
DAVID LONDON,
Acting Director, Litigation Division,
NATHAN SIEGEL,
Special Appellate Attorney,
Office of Price Administration,
Federal Office Bldg. No. 1, Washington, D. C.

HERBERT H. BENT,
Regional Litigation Attorney,
San Francisco, California.

FILED

OCT 24 1945

PAUL P. O'BRIEN,
CLERK

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Statutes and Regulations involved:

Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Sec. 925)-----	1, 2, 55
As amended by the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d sess.)	
General Maximum Price Regulation (7 F. R. 3153) effective May 11, 1942-----	2, 57
Maximum Price Regulation No. 244 as amended (7 F. R. 7871)-----	2, 58
Procedural Regulation No. 6, as amended (7 F. R. 5087) effective July 1, 1942-----	45
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Miscellaneous:

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Senate Banking and Currency Committee Report #922, 78th Cong., 2d sess., p. 14-----	41
90 Cong. Rec. 5380, 5473-5474-----	41, 42, 43

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11025

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

CRAWFORD AND DOHERTY FOUNDRY COMPANY, AN
OREGON CORPORATION, APPELLEE

APPELLANT'S BRIEF

JURISDICTION

This is an appeal by the Price Administrator from a final judgment of the United States District Court for the District of Oregon, dismissing an action brought under Sections 205 (e) and 205 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sec. 925) for statutory damages and to restrain defendant from further violating the Act and Regulations issued thereunder.

The judgment dismissing the action was entered December 21, 1944 (R. 27). Notice of Appeal was filed February 24, 1945 (R. 28-29). Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U. S. C. App. Sec. 925 (c)) and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

PROVISIONS OF THE ACT AND REGULATIONS

The action involves the Emergency Price Control Act of 1942 (50 Stat. 23, 50 U. S. C. App. Sec. 925) as amended, and two Regulations issued thereunder, the General Maximum Price Regulation (7 F. R. 3153) effective May 11, 1942 (hereinafter referred to as the GMPR) and Maximum Price Regulation No. 244 as amended (7 F. R. 7871) effective October 26, 1942 (hereinafter referred to as MPR 244). The pertinent provisions of the Act and Regulations are printed in the appendix to this brief (pp. 55 to 62). The alleged violations are overcharges in the sale of gray iron castings from May 11, 1942, until March 11, 1943. The GMPR (a general freeze regulation) fixed maximum prices for this commodity from May 11, 1942, until October 26, 1942, at which time it was superseded by MPR 244.

STATEMENT OF THE CASE

Defendant is a manufacturer in Portland, Oregon, of gray iron castings. As such, it was without dispute from May 11, 1942 until October 26, 1942 subject to the General Maximum Price Regulation issued by the Price Administrator, and thereafter until the present day subject to Maximum Price Regulation 244.

The GMPR (general freeze regulation effective May 11, 1942) froze prices of thousands of commodities, including gray iron castings at the highest price charged for that commodity in *March 1942*. MPR No. 244 effective October 26, 1942, was intended to roll back prices to purchasers of gray iron castings to the highest price at which the castings were sold

to the same purchasers during the period from *August 1, 1941 to February 1, 1942* inclusive.

From the time the GMPR became effective in May 1942 and for about six months after MPR 244 went into effect in October 1942, defendant made little, if any, effort to comply with these Regulations in its sales to customers. In the summer of 1942 the District Office of the Office of Price Administration in Portland, Oregon, received information from one of defendant's substantial customers that defendant had raised its prices in April 1942 (Pltf.'s Exh. 6, R. 115). Soon thereafter informal discussions took place between representatives of the Office of Price Administration and defendant, as to what the legal and orderly course was in order to raise prices (R. 218-219). As early as September 1942, when defendant had still done nothing to comply with the GMPR, it was advised by letter that ceiling prices "can be increased only on the basis of an application for adjustment" and that defendant as a supplier of castings necessary for the war effort would qualify for adjustment under Procedural Regulation No. 6¹, which provides the procedure for the adjustment for maximum prices for commodities and services under government contracts and subcontracts (R. 256-257, Deft.'s Exh. 33). The letter went on to say "This Regulation permits you to sell at the increased price requested to be established as the ceiling *upon the filing* of the application." (*Italics ours*) (R. 257).

The defendant apparently paid no heed to this letter or to previous warnings, and not only continued

¹ See *infra*, p. 45.

to charge prices in excess of the maximum established for gray iron castings by GMPR and also by MPR 244 which superseded it on October 26, 1942, but even delayed filing its application for an adjustment until March 10, 1943, fully six months thereafter. In view of defendant's persistent refusal to abide by price control, the instant action was commenced on July 31, 1943. Three causes of action were alleged (R. 2-7):

A. The Complaint

(1) That defendant violated Revised Price Schedule No. 4 (which establishes maximum price for various grades of iron and steel scrap) by purchasing scrap at prices in excess of those established by the Schedule (R. 3). This cause of action was abandoned upon the trial (R. 33, 77).

(2) The second cause of action charged sales made by the defendant of gray iron castings in violation of the GMPR and MPR No. 244. These sales covered two periods, those made during May 11, 1942, and until October 26, 1942 (Paragraph IV of complaint, R. 4), and those sales covering the period from October 26, 1942, to March 11, 1943 (Paragraph VI of complaint, R. 5).

(3) For the third cause of action, the Administrator sought treble damages pursuant to the provisions of Section 205 (e) of the Act amounting in the aggregate to \$48,505.62 (R. 6).

As relief, the Administrator prayed for judgment in that sum and also for an injunction restraining further sales in violation of the Act and Regulations issued thereunder (R. 7).

In its second amended answer, the defendant denied generally the specific allegations of wrongdoing charged in the complaint and alleged the following affirmative and separate offenses (R. 8-17):

(1) That prior to March 31, 1942, defendant had fixed its prices for its commodities based upon the cost of material and labor fixed by agreement existing at that time; that thereafter on August 29, 1942, a new agreement was negotiated fixing a wage rate which became retroactive to April 1, 1942; that based on the increased cost of labor the defendant put into effect certain higher prices; that in fixing such prices defendant was compelled to adjust them in order to avoid the consequences of selling its commodities for prices less than the actual cost of production and that such consequences were due entirely to considerations beyond its control (R. 10-11).

(2) That on or about November 10, 1942, soon after the issuance of MPR 244, the defendant, by its Secretary-Treasurer D. B. Card, conferred with the Chief Enforcement Attorney of the Office of Price Administration, Portland, Oregon, in regard to preparing and filing a protest to that Regulation; that the Chief Enforcement Attorney advised the defendant that any protest for adjustment would not be effective unless accompanied by a tender to the Office of Price Administration of the amount of money which it claimed to be owing on overcharges theretofore made to certain purchasers; that the defendant was "prevented" or "induced" not to file such protest because of this advice or information; and that therefore the plaintiff

should be estopped from making any claim against defendant on account of alleged violations of the Regulation subsequent to the date of said advice, viz, November 10, 1942 (R. 11-14).

(3) That the individuals who subscribed their names as attorneys for the plaintiff in this action instituted the action without proper authority from the Administrator and that the action is being prosecuted without authority of the latter (R. 14).

(4) That the sales made by the defendant subsequent to the effective date of MPR 244 to the purchasers named in the complaint were effected through an agreement by which the commodities were invoiced at higher prices which defendant claimed it was entitled to charge under the Regulation with the understanding, however, that the amount of each invoice representing the excess over the price fixed by the Regulation would be withheld by the purchaser pending the final determination of defendant's application for an adjustment; and that defendant's action in fixing said price was not a wilful violation or disregard of the Regulation, nor was this price the result of defendant's failure to take practicable precautions against a violation (R. 15).

(5) That all of the castings which were sold to the purchasers named in the complaint were substantially of the same quality, grade, design, specification, and weight of those sold to purchasers generally located in the same area and that therefore all of these purchasers were "in the same class," even though they were charged different prices during the base periods; and that all such prices were fixed by defendant's of-

ficers in good faith and with intention of complying with the Regulation (R. 15-16).

After answer but prior to trial, defendant's application for an adjustment was denied by the Administrator and this determination was upheld by the Emergency Court of Appeals (146 F. 2d 661). Despite the denial of an adjustment, defendant continued to adhere to its practice of adjustable prices until the trial, and refused and presumably in view of the lower court's holding still refuses to revise its prices downward as required by the Regulation, where an adjustment is denied.

C. The Findings

After a trial of the issues, the Court substantially found in pertinent part as follows:

A. *As to alleged violations under the GMPR* (August 1, 1942, to October 26, 1942).—(1) That during August 1, 1942, and October 26, 1942, defendant's sales of castings were governed by the GMPR (Finding 4, Tr. R. 20) and that its maximum prices under this Regulation were the highest prices charged for the same or similar casting sold during the month of March 1942 to a purchaser of the same class (Finding V, R. 21).

(2) That during the month of March 1942 defendant sold similar castings to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation and Iron Fireman Manufacturing Company (hereinafter referred to as the Purchasers) and also to Marine Electric Co. (hereinafter referred to as Marine); that all these purchasers were of the same class; and that the prices charged

the Purchasers during August 1, 1942, to October 26, 1942, did not exceed the highest prices charged Marine during March 1942 (Finding VI, R. 21).

B. *As to alleged violations under MPR 244* (October 26, 1942, to March 10, 1943).—(1) That during October 26, 1942, and March 10, 1943, defendant's sales and deliveries were governed by MPR 244 and that its maximum prices under this regulation was the highest net price at which it delivered substantially the same casting to the particular purchaser during the period August 1, 1941, to February 1, 1942 (Finding VII, R. 22).

(2) That on or about April 13, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Pump Company to prices above those previously charged these purchasers for similar castings; that in November 1942, defendant entered into adjustable price contracts (to be discussed hereafter) with these purchasers under which invoices would be rendered on the basis of the new price, but pending the determination of the validity of defendant's increased price schedule, the difference between the amount shown by the invoice and the price in effect prior to revision would be withheld by the purchasers; and since November 1942 defendant has continued this practice and made deliveries of castings pursuant to such agreement (Finding VIII, R. 22).

(3) The difference in amount at which castings were invoiced over the prices fixed by MPR 244 so far as Tuerck-MacKenzie was concerned for the period in question was \$1,784.06 (Finding IX, R. 23) and so far as Bingham Pump Company is concerned

was \$3,269.38, both of which sums have been withheld by each purchaser (Finding X, R. 23).

(4) That on or about October 20, 1942, defendant increased its price schedule to Willamette Iron & Steel Corporation retroactive to March 1, 1942; and in November 1942 defendant entered into an adjustable price arrangement with this purchaser similar to the one referred to above (Finding XI, R. 23, 24) and that the difference in amount at which prices were invoiced over the prices fixed by MPR 244 was \$3,646.20, which amount was also withheld by this purchaser pursuant to arrangement (Finding XII, R. 24).

(5) That during October 26, 1942, to December 31, 1942, defendant sold and delivered castings to Iron Fireman Manufacturing Company; that such sales were made at prices not in excess of the maximum prices as established by MPR 244 for the same castings as were sold during that period to Marine (Finding XIII, R. 24, 25); also that Iron Fireman and Marine were purchasers of the same class and that the prices charged Iron Fireman did not exceed the prices charged Marine during August 1, 1941, to February 1, 1942 (Finding XIV, R. 25).

As a general finding, the Court found that "during all said times" the violations by defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violations (Finding XV, R. 25). And finally, the Court found that the bringing of the action was not authorized by the Administrator (Finding XVI, R. 26).

As a conclusion of law the court gave judgment for the defendant, dismissing the action (Conclusion of Law I, R. 26) and indicated that the Administrator's prayer for injunctive relief likewise fell at the same time (R. 290). From a judgment to this effect (R. 27) this appeal was taken (R. 28). The issues here are:

D. The Issues

(1) Was the court correct in refusing to grant relief for violations of the GMPR because of its belief that purchasers were of the same class when they bought similar castings, even though the GMPR provides, and has been consistently interpreted to mean, that purchasers who paid different prices during the base period are not in the same class; and

(2) was the court correct in refusing to grant relief for violations of MPR 244 because of its belief that the prices paid by the Purchasers were no higher than those paid by Marine for the same or similar castings during the base period of that regulation, even though MPR 244 provides that the maximum price for such castings shall be the highest net price paid by a particular purchaser at that time.

All that is involved on this appeal, therefore, is a question of the proper construction of the Regulations.

SPECIFICATIONS OF ERROR

(1) The Court erred in dismissing the action (Conclusion of Law I, R. 26).

(2) The Court erred in failing to award judgment in favor of appellant as prayed for in the complaint.

(3) The Court erred in refusing to grant the injunction as prayed for in the complaint (R. 290).

(4) The Court erred in finding as a fact or concluding as a matter of law that Marine Electric Company was a purchaser of the same class as Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company (Findings VI, R. 21).

(5) The Court erred in failing to find that defendant violated the General Maximum Price Regulation in its sales made to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company during the period August 1, 1942, to October 26, 1942 (cf. Finding VI, R. 21).

(6) The Court erred in failing to hold and conclude as a matter of law that even if adjustable price agreements or arrangements had been made as set forth in Findings of Fact VIII and XI, defendant violated Maximum Price Regulation 244 by selling or delivering commodities accompanied by or under invoices showing prices higher than those permitted by said regulation (Findings VIII, R. 22; XI, R. 23, 24).

(7) The Court erred in failing to find that defendant violated Maximum Price Regulation 244 in the sales made to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company during the period October 26, 1942, to March 10, 1943 (cf. Findings VIII to XIV, R. 22-25).

(8) The Court erred in failing to find that defendant was in violation of Maximum Price Regulation 244 up to the day of the trial.

(9) The Court erred in finding that during all of the period from August 1, 1942, to March 10, 1943, the violations of the defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation (Finding XV, R. 25).

(10) The Court erred in failing to grant judgment for treble damages as prayed for in the complaint.

(11) The Court erred in finding as a fact and concluding as a matter of law that the attorney or attorneys who instituted this action on behalf of appellant were without authority to do so (Finding XV, R. 25).

(12) The Court erred in refusing to grant plaintiff's motion for an order striking from defendant's second amended answer all of the allegations contained in defendant's affirmative answers and defenses (R. 17).

SUMMARY OF ARGUMENT

As a dealer in gray iron castings, defendant was subject to the General Maximum Price Regulation from May 11, 1942, until October 26, 1942, and thereafter to the Maximum Price Regulation No. 244 which superseded it. The GMPR limited the price which any seller might charge for gray iron castings to the highest price which he charged for that commodity to a purchaser of the same class during the base period, which is the month of March 1942; MPR 244 limited the ceiling price to the highest price which the seller charged a particular purchaser during the base period, which is August 1, 1941, to February 1, 1942. Under the plain language of the GMPR and MPR 244, and

of the administrative interpretations which consistently have been placed upon them, as well as the construction given them by this Court and by two other Circuit Courts of Appeals, a practice adopted by the seller of charging different customers different prices for the same commodity is sufficient by itself to put each in a separate class, even though they buy similar products. When defendant, having adopted such a practice in its base period, increased its price to some of its customers over the prices which it charged to the same customers in the base periods, it violated each of these Regulations. In dismissing this action, the District Court has condoned the defendant's unlawful practice, and under its decision the defendant is now in violation and will continue to disregard MPR 244. Judgment should have been granted for full statutory damages in treble the amount of the overcharges, and injunctive relief as prayed for in the complaint should issue.

ARGUMENT

I

Defendant plainly violated the applicable regulations

This case hinges on a determination of what the Administrator meant by the words "purchaser of the same class" as used by the General Maximum Price Regulation and by the words "such purchaser" as used in Maximum Price Regulation 244. It is the contention of the Administrator that under a plain reading of these Regulations and based on a consistent series of administrative interpretations and

judicial decisions, purchasers are not of the same class where they have paid different prices to the seller during the base period established by the Regulations. It is the contention of the defendant that the words "purchaser of the same class" should be construed as meaning purchasers of the same kinds of material, qualities, grades or specifications who in a *general* sense are in the same class (R. 15-16). It is the further contention of the defendant that if the Regulation compels the continuance of a price to a particular customer paid by the latter during the base period, regardless of what the general price was, that it is "entirely illegal" as being "beyond the power of the Administrator" (R. 246). For a determination of these and the other issues we must look to the Regulations involved in this case, to the interpretations of these Regulations given to them by the Administrator and to the construction placed upon them and the Act by the Courts.

A. The regulations and interpretations of the Administrator

Section 2 (b) of the GMPR (applicable to the alleged violations during August 1, 1942, to October 26, 1942, Finding of Fact IV, R. 20), declares that "the 'highest price charged' shall be a price charged during March 1942 to a purchaser of the same class". (See, *infra*, p. 58.) Section 20 (k) defines "purchasers of the same class" by reference to "the practice adopted by the seller in *setting different prices* for commodities or services *for sales to different purchasers* or kinds of purchasers * * *". [Italics ours.] Appendix A of Section 1421.166 of MPR 244 (applicable to the alleged violations during October 26,

1942, to March 10, 1943 (Finding of Fact VII, R. 21-22), provides that any casting sold after the base period which is identical with a casting sold during the base period is frozen to the highest price at which the casting was sold, with this proviso, however, that if a casting is sold to the *same* customer, the price charged to that customer during the base period becomes the maximum price on a subsequent sale to *such* customer, even though the casting was sold at higher prices to *other* customers during the base period.

The price criterion is therefore not only made as clear as language can make it under the provisions of both these Regulations, but it is also fortified by official interpretations of them. Thus the official interpretation of the GMPR on August 20, 1942 (OPA Serv. 11: 968-9), stated the following:

Frequently, of course, a seller may have had the practice of giving a customer special low prices with the complete absence of any criteria which can be objectively applied. Thus a seller may have customarily given one customer—who by all objective tests was exactly like many other customers—a special low price out of friendship, or habit, or whim, or because the particular customer was exceptionally good at haggling. In such a case, *this buyer is in a separate class by himself; his class was established by the seller's practice of giving him a lower price.* However, because the criterion (friendship, habit, whim, ability to haggle, etc.) is one which cannot be objectively applied or duplicated and depends primarily on the seller's emotions, the class is "nonadmissible." Other persons need not be admitted to the class, even though they

claim, for example, to be as good friends of the seller as the favored buyer. The criterion of friendship is not one which OPA can be expected to apply. By the same token, however, OPA cannot be expected to pass upon the disappearance of the subjective criterion. The "friend" is in a separate class and entitled to a lower price even though amicability disappears and the "friends" come to blows. (Of course, the seller can always refuse to sell to his "friend" at any price.) Fundamentally, the one criterion capable of objective delineation and application was that this *particular* seller did customarily get a *lower* price, and it is this criterion which *must be continued*.

Accordingly, a view, sometimes expressed, that classes can be established only if a "business reason" exists for the classification *is not well founded*. [Italics added.]

On September 22, 1942, the Administrator once again issued an official interpretation on the phrase "purchasers of the same class" used in the GMPR giving the following illustration:

Thus if a laundry customarily charged two customers different prices at the same time the two customers are in separate classes even if one customer sometimes paid more than the other and sometimes less (OPA Serv. 11: 969).

Similarly MPR 244 contains an official interpretation to the same effect. This interpretation appears in a simple example in footnote 11 of Section 1421.166 of Appendix A as follows (see, *infra*, pp. 61-62):

Examples of the method of computing base-period maximum prices are as follows: Assume

that the seller sold or offered for sale in the period between August 1, 1941, and February 1, 1942 (hereinafter referred to as the "base-period"), to purchasers A and B, but not to purchaser C, a casting which is identical to the casting to be priced and that the highest net prices to purchasers A and B in the base-period were 7¢ and 8¢ per pound, respectively. If the seller proposes to sell the casting to C, his maximum price is 8¢ per pound (subject to the provisions of § 1421.166 (a) (3) on overtime). *The seller's maximum price to purchaser A would be 7¢ per pound and to purchaser B would be 8¢ per pound* (subject to the provisions of § 1421.166 (a) (3) on overtime). [Italics ours.]

In view of the importance of definiteness and certainty in the application of the price regulations, the Administrator at the very inception of price control adopted the practice of issuing in writing, on request from any persons affected by a regulation, interpretations thereof which were binding on him until revoked. In the large number of interpretations which have been issued in this manner the position has been uniformly and consistently taken that price differences for different purchasers during the base period placed them in different classes of purchasers.

By the process which has been described, the established construction of the Price Administrator has been woven into the fabric of the regulation. Millions upon millions of individual transactions have been settled upon the basis of it. That construction can thus claim for itself all the weight to which settled practice in human affairs is entitled. It is supported not merely by the presumed expertness of an admin-

istrative agency in determining the meaning of its own regulation. It is supported, even more importantly, by the fact that it has been outstanding and constantly applied and reapplied in innumerable transactions. The guiding principles of interpretation under such circumstances were stated by the Supreme Court recently in *Bowles v. Seminole Rock & Sand Co.*, — U. S. —, 65 S. Ct. 1215, as follows:

The problem in this case is to determine the highest price respondent charged for crushed stone during March 1943 within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.² The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

² So far as the phrase "purchaser of the same class" in the GMPR is concerned, there can be little question of the correctness of the Administrative interpretation since three Circuit Courts of Appeal have accepted it as binding. (See *infra*, p. 20.)

The court below, however, did not even refer to this settled administrative construction of the regulation but alluded to the Price Administrator's view as if it were a position taken for the first time in this lawsuit. The court then proceeded to consider the language of the Regulation but impressed its own gloss upon it. This was plain error. Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator's views as to the meaning of the statute under which he is operating (*Skidmore v. Swift & Co.*, 323 U. S. 134, 137-140). The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. The Supreme Court has gone so far as to say that the latter type of "interpretation is binding upon the courts"; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143; cf. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; see also, *Bowles v. Glick Brothers Lumber Co.*, 146 F. 2d 566, 568, footnote 2 (C. C. A. 9th, 1945) cert. denied 65 S. Ct. 1554, and is of "controlling weight unless it is plainly erroneous or inconsistent with the Regulation" (*Bowles v. Seminole Rock & Sand Co.*, *supra*).

It is not necessary to go that far here, however, inasmuch as the construction adopted by the court below is wholly without merit. As has been seen, the language of the regulation is plain and compels

the construction placed upon it by the Price Administrator.

B. The authorities

The construction urged by the Administrator has received judicial approval in each instance where this question was raised in a Circuit Court of Appeals. In *Bowles v. Nu Way Laundry Co.*, 144 F. 2d 741 (C. C. A. 10th, 1944), cert. denied 65 S. Ct. 431, the court construing the phrase "purchaser of the same class" under Maximum Price Regulation 165, which governs prices for various services, and the GMPR said (p. 747):

* * * In other words, the test is not necessarily whether customers were purchasing the same service in the same area during the same period of time, but whether the said purchasers were paying the same prices for the same services during the base period. * * *

So, too, in *Rainbow Dyeing and Cleaning Co., Inc., v. Bowles*, 150 F. 2d 273 (App. D. C., 1945), the Court likewise had occasion to construe the words "purchaser of the same class" and held that "a seller's practice 'in setting different prices * * * to different purchasers' puts each purchaser who pays a different price according to this practice in a different 'class.'" And this Court in *Bowles v. Wheeler*, — F. 2d — (C. C. A. 9th, August 1, 1945), came to the same conclusion in its construction of the phrase "purchaser of the same class" as it appears in General Maximum Price Regulation and Maximum Price Regulation 165 relating to logging services.

Judge Bone said:

Applying the regulations to the facts disclosed by the record, we are convinced that appellee's customers, as of March 1942, and subsequent thereto, were not purchasers of the same class, but were set in different price classes according to economic conditions and appellee's own need for business at the time they became his customers. His own testimony shows this.

The Administrator's interpretation of the Maximum Price Regulation No. 165 as to "purchasers of the same class" was upheld in *Bowles v. Nu Way Laundry*, supra. The court found that under applicable regulations (General Maximum Price Regulations, Section 20 (k), applicable from February 1, 1943, to June 23, 1943) and Maximum Price Regulation 165 (applicable June 23, 1943, to September 30, 1943) all of appellee's customers during March 1942, and during February 1, 1943–September 30, 1943, were purchasers of the same class, and therefore, since the price range for appellee's customers as of March 1942 was 60¢ to 80¢, any change of rates by appellee within the limits of these figures would not violate the regulations. Section 20(k) of the General Maximum Price Regulation defines "purchaser of the same class" by reference to "the practice adopted by the seller in setting forth prices for commodities or services for sales to different purchasers or kinds of purchasers." A similar definition occurs in Maximum Price Regulation 165.

Both of the above regulations were clearly interpreted by the Administrator as to the meaning of the phrase "purchasers of the same

class.” See for G. M. P. R., Pike and Fischer, O. P. A. Service, pp. 11:968,9; for M. P. R. 165, “Manual No. 2 under Maximum Price Regulation 165—Services”, p. 21, Pike and Fischer, O. P. A. Service, p. 15:819. Illustrative of the Administrator’s interpretation is this sentence taken from the “manual”:

“Whether one class of customer is or is not the same as another class depends principally on your own business practice. If you customarily recognized one class as differing from another by charging different prices, you will be required to continue treating them as different classes.”

The regulations seem clear, but if ambiguous, the Administrator’s interpretation, as indicated above, is entitled to great weight. Compare *Consolidated Power & Paper Co. v. Bowles*, 146 F. (2d) 492 (Em. Ct., 1944); *Bowles v. Seminole Rock & Sand Co.*, No. 914, June 4, 1945, — U. S. —; *Bowles v. Nu Way Laundry*, supra.

Unless these well-considered rulings are now to be set aside or ignored, there is no escape from the conclusion that the District Court erred in holding that the purchasers named in the complaint were of the same class as the Marine Electric Company³ (Finding VI, R. 21; Finding XIV, R. 25), and in dismissing the complaint for that reason.

³ The prices charged during the base period to Marine Electric Co., who on defendant’s own admission “were never big users” (R. 183) were consistently higher than the cost to other purchasers (R. 192). It was not merely a chance, sporadic pricing practice, but obviously based on the ground that during 1941 and up to January 1942 Marine Electric was only an “occasional” purchaser to the extent of \$180.00 per month (R. 260) compared to the other purchasers like Tuerck-MacKensie and Bingham who were purchasing between \$2,000 and \$5,000 per month (R. 156-157, 160).

It remains only to consider the contentions of the defendant raised either by answer or during the trial.

CONSIDERATION OF CONTENTIONS RAISED BY DEFENDANT

I

The first affirmative defense raised by defendant was that prior to March 31, 1942, defendant had fixed its prices for its commodities based on the cost of material and labor fixed by agreement existing at that time; that thereafter on August 29, 1942, a new agreement was negotiated fixing a wage rate which became retroactive to April 1, 1942; that based on the increased cost of labor the defendant put into effect higher prices and, in fixing such prices, was compelled to adjust them in order to avoid the consequences of selling its commodities at prices less than the actual cost of production; and that such consequences were due entirely to considerations beyond the control of the defendant (R. 10, 11).

1. This is a claim of hardship which the court below was barred from considering, since it is a matter which Congress has reserved exclusively for the determination of the Emergency Court of Appeals (*Yakus v. United States*, 321 U. S. 414). "If the hardships recognized by the trial court as constituting the basis for a denial of the injunction [the only relief requested] are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act (Sections 203 (a) and 204 (a), (b), (c), (d), and not in the trial court)" (*Bowles v. Nu Way Laundry Co.*, *supra*, 144 F. 2d at p. 748).

2. The same objection can be made to defendant's contention, couched in somewhat different language, that it was beyond the power of the Administrator to continue a price to a particular customer regardless of what the general price was and that, therefore, so far as that part of the Regulation is concerned "it is entire illegal" (R. 246). Obviously, this objection also constituted a challenge to the validity of the price-fixing regulation which was a matter solely for the Emergency Court of Appeals (*Rosensweig v. United States*, 144 F. 2d 30 (C. C. A. 9th, 1944), cert. denied 65 S. Ct. 117; *Taylor v. United States*, 142 F. 2d 808, 817 (C. C. A. 9th, 1944), cert. denied 65 S. Ct. 56; *Bowles v. Sanden and Ferguson*, 149 F. 2d 320 (C. C. A. 9th, 1945); *Bowles v. Meyers*, 149 F. 2d 440 (C. C. A. 4th, 1945)).

3. The fact is, as the Emergency Court of Appeals ultimately held, there was no merit whatever in defendant's claim for adjustment. The Emergency Court of Appeals pointed out that the defendant's profit, while only about 2% on sales in 1942, rose to over 12% on sales in the first half of 1943, and that the defendant's net income on sales for the first half of 1943 amounted to over 100% on the par or stated value of its capital stock. Upon that record the court said that the Administrator's action in denying the application for adjustment was neither arbitrary nor capricious (*Crawford & Doherty Foundry Co. v. Bowles*, 146 F. 2d 661 (E. C. A. 1944)) and on this trial too, defendant admitted a substantial increase instead of a decrease in its earnings (R. 189).

II

The second affirmative defense was that on or about November 10, 1942, following the issuance of MPR 244 (on October 21, 1942), defendant by its Secretary-Treasurer, D. B. Card, conferred with the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, in regard to filing a protest to such Regulation and was advised that an application for adjustment would be unavailing unless defendant tendered a settlement of sums alleged to be owing to certain purchasers because of overcharges since the effective date of the Regulation; that defendant in good faith relied on these representations and was induced not to file a protest; and that plaintiff should be estopped from making any claim on alleged violations subsequent to November 10, 1942, the date of the advice (R. 11-14).

While this excuse for failing to comply with the Regulation bears the earmarks of plausibility, it does not withstand analysis.

1. In the first place defendant provides no explanation at all for its failure and refusal to adhere to price ceilings from May 1942 until November 1942. During this period defendant was urged repeatedly to file an application for adjustment under the GMPR and Procedural Regulation 6 but did not do so. During July 1942 when defendant's violation came to the attention of the OPA, conferences were held by a representative of the OPA with Mr. Card for the purpose of obtaining defendant's compliance with the GMPR (R. 264-265). These efforts were exerted to no avail. On

September 14, 1942, defendant was advised by letter that the March base period provided by the GMPR controlled its sales to Willamette Iron and Steel Company and the Iron Fireman and that "this price can be increased only on the basis of an application for adjustment" (Deft's Exh. No. 33, R. 255); and that since the castings are produced for installation in ships being constructed on contract with the government "you would qualify for adjustment under Procedural Regulation No. 6 (R. 257). Yet despite this advice, defendant not only continued to violate the Regulation but did absolutely nothing about filing its application for adjustment until March 10, 1943, more than six months thereafter.

True, when defendant finally filed its application for adjustment it was advised on March 12, 1943, by MacCormac Snow, Chief Enforcement Attorney of the OPA, that the adjustment application "could not be acted upon to permit you to quote the prices you request in your application" until a satisfactory adjustment was made on past overcharges (R. 255). But by April 2, 1943, only three weeks later, this condition was withdrawn and defendant was told that it could charge the prices requested in the application under Procedural Regulation No. 6 (R. 254). It thus appears that any misconception that was suffered by Mr. Card was confined at most to about three weeks from March 12, 1943, to April 2, 1943. But how does this explain defendant's continued violations from April 1942 to this day and failure for approximately nine months to take the remedial steps urged upon it?

It would perhaps be a mitigating factor if defendant violated for the first time after it received the erroneous instructions from Mr. Snow on March 12, 1943. Here, however, the defendant was not only a consistent violator prior to the instructions sent at that time but even continued to violate the Regulation after it received correct advice. It is, therefore, clear that defendant's inaction and defiant disregard of the Regulations during the period mentioned in the complaint was not influenced at any time by any of the advice received from the Office of Price Administration (cf. *Rainbow Dyeing & Cleaning Co., Inc.*, v. *Bowles*, *supra*, footnote 4).⁴

2. Secondly, there are no charges of violation in the complaint for any period beyond March 10, 1943, so we fail to see how defendant was prejudiced by a statement made to it on March 12, 1943.

3. Third, since Mr. Snow was not one of those persons named in Revised Procedural Regulation No. 1,⁵

⁴ "In July 1943 an OPA inspector erroneously told appellant that its price increases were lawful. But appellant made the increases before it got this erroneous advice, and continued them in effect after it got correct advice. It is therefore clear that the increases were not due to the erroneous advice. Appellant does not suggest that its conduct was influenced, at any time, by any advice from the Office of Price Administration. Moreover, the inspector had no power to bind the Office of Price Administration. Revised Procedural Regulation No. 1, §§ 1300.51-1300.52, 7 Fed. Reg. 8961, 8965, amended 8 Fed. Reg. 3313; cf. *Nichols & Co. v. Secretary of Agriculture*, 1 Cir., 131 F. 2d 651, 658, 659, reversed on other grounds, 136 F. 2d 503" (150 F. 2d at p. 275).

⁵ § 1300.52 (b) *Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or

Section 1300.51-1300.52 (7 F. R. 971, 3663, 5776, effective November 4, 1942), who had authority to issue and *sign* the instruction contained in the letter of March 12, 1943, the doctrine of estoppel against the Administrator cannot come into play (*Rainbow Dyeing & Cleaning Co., Inc. v. Bowles*, *supra*, footnote 5; *Bowles v. Indianapolis Glove Co.*, 150 F. 2d 597 (C. C. A. 1945)). In the last mentioned case, it was said:

Defendant's last contention is of estoppel. It bases this argument on the conduct of the Administrator in inducing it, for a part of the period complained of, to sell its gloves at prices now charged to violate the law. A similar argument was presented to the Emergency Court of Appeals in the case, *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364. The court, speaking through Judge Lindley, said, "It must be presumed that complainant was advised of the procedure it was required to follow in order to obtain an official interpretation upon which it could properly rely. And, since it failed to comply with the prescribed method, it is not entitled to rely upon unofficial oral advice given by subordinate officials in the Office of Price Administration. At first blush, this may seem harsh but, obviously, the Administrator cannot be bound by various oral interpretations which happen to be made by his hundreds, perhaps thousands, of employees, in violation of pub-

Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any State Attorney, or State Price Attorney and any Chief Attorney or Chief Price Attorney for a District Office. [Italics ours.] In this case the letter was signed by Mr. Snow, Chief Enforcement Officer, who held an office not included among those authorized to sign.

lished regulations. He has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations by which all will be bound. Complainant is not entitled to rely on an unofficial interpretation." That part of the advice relied upon by defendant in the case at bar to sustain its charges of estoppel was in writing makes it no more binding upon the Administrator than the oral advice in the Wells case.

See also: *Nichols & Company v. Secretary of Agriculture*, 131 F. 2d 651, 659 (C. C. A. 1st, 1942); *Bowles v. Sisk*, 144 F. 2d 163 (C. C. A. 4th. 1944).

III

The third affirmative defense is that the action was instituted without authority of the Administrator (R. 14).

The Administrator's delegation of the authority to institute suits, to, *inter alia*, the Regional Enforcement Attorney or his delegate, was made in Revised General Order 3 (8 F. R. 116), issued June 10, 1943 (R. 274), and suit was instituted here pursuant to that authority on July 31, 1943 (R. 8). In addition, the suit was ratified by the Administrator on September 7, 1944 (Second Revised General Order 3, 9 F. R. 11137) (R. 277).

The District Court's previous ruling in *Bowles v. Wheeler*, was urged upon it by defendant in this case (R. 270) and adopted in the Court's finding that the bringing of this action was unauthorized (Finding XVI, R. 26). After the trial of the instant action, *Bowles v. Wheeler* was reversed on appeal, — F. 2d

— (No. 10,924, decided August 1, 1945). This Court's conclusion in the *Wheeler* case that the suit was properly instituted and authorized by the Administrator is, of course, dispositive of the same issue raised here.

IV

The fourth affirmative defense was that sales made by defendant subsequent to the effective date of MPR 244 to the purchasers named in Paragraph VI of the complaint, namely, Tuerck-MacKenzie Company, Willamette Iron and Steel Company and Bingham Pump Company, were made subject to an agreement that the sales were to be invoiced at those higher prices which defendant claimed it was entitled to charge, on the understanding that the amount of each invoice representing the excess over the price which plaintiff claimed was the established price would be withheld by the purchaser pending the final determination of defendant's application for an adjustment; and that defendant's action in fixing said price was not a wilful violation or disregard of the Regulation nor the result of defendant's failure to take practicable precautions against a violation (R. 15). There are many reasons why this defense of good faith and the taking or practicable precautions is lacking in merit.

1. Section 1421.156 of MPR 244 allows for adjustable pricing *provided an application for adjustment is pending*. (See, *infra*, pp. 59-60.) Defendant has made no claim that it was unaware of this condition. Yet, in the instant case, the contracts containing adjustable pricing were entered into with Tuerck-MacKenzie Company, Willamette Iron and Steel Company, and Bing-

ham Pump Company in the early part of November, 1942 (findings VIII and XI, R. 22-23) on or about April 14, 1942 (R. 118, 126, 188) and adhered to even though application for adjustment was neither filed nor *not* yet pending as was required first by the GMPR and Procedural Regulation 6 and thereafter by MPR 244. This factor alone would impeach defendant's belated cry of good faith and the taking of practicable precaution, particularly where one of the co-owners of the defendant, Mr. Card was a certified public accountant (R. 233), who was fully aware of the defendant's obligations under the Regulations and constantly in touch with representatives of the Office of Price Administration who were trying to bring him into compliance (R. 218-219).

2. Since the instances under which the charging of the requested overceiling price is permitted constitutes an exception to the general rule of the Regulation establishing maximum prices, the condition which the Administrator has imposed (namely the filing of an adjustment) must be strictly adhered to if the privilege of adjustable pricing is to be made available at all. Here, although the adjustment procedure could have been exercised under the GMPR and Procedural Regulation 6 in July 1942 and under MPR 244 in October 1942, defendant first filed its application for an adjustment on March 10, 1943. Meanwhile as shown above, defendant's unlawful agreement which went into effect in November 1942 was continued from that time until the present date. The overcharges contemplated by these agreements were not discontinued even after the adverse decision on

September 28, 1944, by the Emergency Court of Appeals denying the application for adjustment, although Section 1421.156 of MPR 244 expressly provides that if the order of the Administrator denies the application, the contract price shall be revised downward to the maximum price ordered. In the face of these undisputed facts to say that defendant acted in good faith is absurd. Far from exercising good faith and taking practicable precautions against violations, defendant's persistent refusal to act under the GMPR or MPR 244 constitutes nothing less than wilful violation and complete disregard of the price regulation.

3. If the objection is that the Administrator acted arbitrarily in allowing adjustable prices only where a pending application for adjustment had been made, and by prohibiting similar agreements if the application for adjustment was not made, the answer is that this constitutes a challenge to the validity of the Regulation which cannot be made here. (Cases cited, pp. 23-24, Cf. *Speten v. Bowles*, 146 F. 2d 602 (C. C. A. 8th, 1945) cert. denied April 23, 1945).⁶ For the purposes of this suit the Regulation must be accepted as valid, and that being so, "obedience was owing while the order was in force" (*Atlantic Coast Line Co. v. State of Florida*, 295 U. S. 301, 311).

4. In view of what has just been said, it is not material here to go into the question as to whether the Administrator acted arbitrarily in issuing the Regu-

⁶ There, appellant attempted to challenge the unfairness of a regulation in allowing regular dealers in farm equipment to add shipping charges to the base period price while denying the same right to those, like appellant who were not regular dealers.

lations involved in this case. Yet it would not be amiss to point out that the Administrator was fully justified in making a distinction between a dealer who agrees to invoice at prices in excess of ceiling while an adjustment is pending, and a dealer who issues similar invoices even though an adjustment is not pending. In the first case, the dealer is proceeding in an orderly way according to law. This in and of itself is proof of good faith. In the second case his conduct flaunts the legal process and he is acting in direct violation of the law; and such conduct is by no means a badge of good faith. There is also a practical difference, apart from the legal distinction between both courses of action which the Administrator recognized in prohibiting invoicing of sales at overceiling prices unless and until an adjustment was pending. The Administrator knew that parties might be perfectly willing to contract at overceiling prices in the hope that if discovered, they could always point to the face of their written contract as proof of their honorable intentions. Many purchasers in need of a ready source of supply during a scarce market might not hesitate to be a party to an agreement of this character on the theory that their overpayments in any event could be passed on to other purchasers equally anxious to obtain goods. And it is precisely by that course of action that the floodgates of inflation are opened.

One overcharge in the chain of sellers is bound to beget another⁷ and “—successive trickles grow into

⁷ Thus, for example, in a letter dated July 20, 1942, Tuerck-MacKensie Co., one of the larger purchasers from defendant,

torrents which sweep away the dam'' (*Brown v. Mars*, 135 F. 2d 843, 849 footnote (C. C. A. 8th, 1943) cert. denied 65 S. Ct. 368). If the seller refrained from applying for an adjustment for a sufficiently long enough period, the war might be over, OPA would be abolished, and the parties could then work out their claims against each other as if price regulation had not existed. Also, in the absence of an application for adjustment it would be easy in the course of a long running account to manufacture all kinds of excuses for getting the overcharges back from the purchasers who had withheld them, or retaining them if the purchasers had paid them by means of illegitimate offsets of one kind or another. With the institution, however, of adjustment proceedings, the parties to the transaction soon know exactly where they stand, what amount is owing and the date when it is due, and their records which are subject to inspection reflect it. Once adjustment proceedings are instituted therefore, price control is far less subject to manipulation and evasion than where no adjustment proceeding is on file. At the same time it immediately tends to protect an innocent purchaser or seller who in good faith is trying to comply with the Regulation. It also prevented the war effort from being impeded, since the chief purposes of MPR 244 and Procedural Regula-

wrote the Office of Price Administration that "the castings which we have been buying from Crawford & Doherty for several years constitute the major part of the cost of the finished article, and it will be impossible to buy them at the increased price * * * unless we are allowed to make similar raises in our ceiling prices" (R. 116).

tion No. 6 in providing for adjustable prices were to prevent any interruption in the flow of goods for war purposes because of price controversies between buyer and seller, and to save defense appropriations from being dissipated by excessive prices.

Accordingly, defendant's well designed delay in filing an adjustment could result only in frustrating these purposes, and sharply rebuts the claim of good faith or taking of practicable precautions.

The withholding of the overcharge by the purchasers is not evidence of defendant's good faith or failure to take practicable precautions

5. Surely, the mere fact that the purchaser withheld the overcharge does not constitute good faith and the exercise of practicable precautions "against the occurrence of the violation." The violation consisted of invoicing the sales at higher prices than the established maximum price and delivering the same at a time when the adjustment was not pending. In the absence of a pending application for adjustment, Section 1421.151 of MPR 244 controlled. This Section, read together with Sec. 1421.166, provides that on and after October 26, 1942, a person is prohibited, *regardless of any contract, agreement, or other obligation, to sell or deliver* gray iron castings at a price higher than the maximum price paid by the same purchaser during the base period (August 1, 1941, to February 1, 1942) and likewise is forbidden from agreeing, *offering, soliciting, or attempting* to do any of the foregoing. (See, *infra*, pp. 59, 61). Obviously when the sale was invoiced at a price higher than the established maximum price and the commodity delivered pursuant to such sales invoice, the Regulation

was violated. This view is also fortified by reference to the Act.

Section 205 (e) of the Act provides:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the *overcharge* * * * [Italics ours].

The right of action under this section accrues against a seller who violates a maximum price regulation by overcharging. The section defines "overcharge" as:

* * * The amount by which the consideration exceeds the applicable maximum price
* * *

The "consideration" referred to in this definition does not have to be paid by the buyer. This conclusion is confirmed upon a reading of Section 302 (b) of the Act which defines price as:

The term "price" means the consideration *demand*ed or received in connection with the sale of a commodity. [Italics added.]

From a reasonable reading of this section, therefore, it is apparent that if a seller merely *demand*s an overceiling price, he has "overcharged" within the meaning of 205 (e). It is then immaterial that the purchasers in this case have always retained the overcharges. Payment in whole or part is not in any way essential or a prerequisite for making the

transaction unlawful. The regulation may be violated even if no payment whatever is made once the parties deliver any commodity at a price in excess of the established ceiling price. If the withholding of the *entire* payment is unimportant so far as *criminal* liability under the Act is concerned (*United States v. Lutz*, 142 F. 2d 985 (C. C. A. 3rd, 1944)),⁸ the withholding of *partial* payment can be of no consequence in a *civil* action.

V

The fifth affirmative defense is that all of defendant's castings were of the same kind, grade, specifications, etc., sold to purchasers located in the same area and therefore all purchasers were in the same general class; that after the issuance of the GMPR defendant, acting in good faith, was attempting to determine the applicability of the maximum prices

⁸ In the *Lutz* case, *supra*, the defendant was charged and found guilty of having "bought and received" potatoes at prices above the permitted maximum. On appeal defendant claimed that the transaction was a sale for cash and that *since the cash had not been paid* for the potatoes at the time when the OPA agent interceded, title never vested in the defendant and therefore he cannot be said to have "bought them." The Circuit Court dismissed this contention as untenable. See also, *Bowles v. Leventhal* (S. D. N. Y., Civ. No. 26-113, March 1945), 3 OPA Op. & Dec. 2017, where defendant in resisting an action for treble damages claimed that as to one shipment he should not be held liable because the shipment had been returned and the money refunded. Notwithstanding this rescission, Judge Knox held him to be liable in treble damages and declared that otherwise it would " * * * place the rights of the Administrator at the mercy of black market sellers and buyers, and they would be enabled, in some cases, utterly to frustrate the remedial purposes of the statute."

fixed by said Regulation as the same related to the various purchasers of the defendant during the time the Regulation was in effect; that during said period defendant's officers conferred with representatives of the Portland office for the purpose of informing themselves as to the applicability of said price; that prices were fixed in good faith and with full intention of complying with the Regulation.

The first part of this defense restates the major contention of defendant that the purchasers named in the complaint were of the same class as the Marine Electric Company. This contention has been fully answered at pages 14 to 22 of this brief.

The second part of this defense which refers to conferences held with representatives of the Office of Price Administration, and defendant's alleged good faith and intention of complying with the regulations has been discussed in this brief at pages 25 to 27.

We think it is plain there is no merit whatever to any part of this defense.

II

Since defendant's conduct was wilful and since it failed to take practicable precautions against the occurrence of the violations, the proper measure of damages is treble the amount of overcharges

Since the district court held that the Regulations were not violated, it had no occasion to determine the proper measure of damages in this case. It becomes appropriate to turn to this question now.

Under Section 205 (e) of the Act as originally enacted, the amount of the recovery, if it was once

established that a price violation had taken place, was definitely fixed at three times the amount of the overcharge, or \$50, whichever was greater, regardless of extenuating circumstances (*Bowles v. American Stores*, 139 F. 2d 377 (App. D. C., 1943) cert. denied, 322 U. S. 730). Section 205 (e), however, was amended on June 30, 1944, by Section 108 (b) of the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) so as to permit a defendant to reduce the amount of the recovery upon a showing that the violations were neither wilful nor the result of failure to take practicable precautions to avoid their occurrence. (See Appendix to Brief, p. 56.) Absolute liability for at least the amount of the overcharge, or \$25, whichever is greater, was, however, provided for, even in the event *both* of the aforementioned elements were established (*Augustine v. Bowles*, 149 F. 2d 93 (C. C. A. 9th, 1945)). This amendment was made applicable to proceedings "pending" on the date of enactment as well as to proceedings instituted thereafter. Defendant availed itself of the privilege provided by this change in the Act by amending its pleadings as to allege that as to sales made by it subsequent to the effective date of Maximum Price Regulation 244 to the purchasers named in Paragraph VI of the complaint, defendant's action in fixing prices was not a wilful violation of, or disregard of, said price regulation, nor was said price the result of defendant's failure to take practicable precautions against a violation (R. 15).

And the district court found the following in Finding XV (R. 25).

The Court further finds that during all said times the violations of the above-mentioned price regulations, order or price schedules by said defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violations.

It is not clear whether the words "all said times" in this Finding refer not only to the alleged violations during which Maximum Price Regulation 244 was in effect, but likewise the General Maximum Price Regulation. Significantly, defendant did not interpose this defense respecting those sales made by it during the period that the General Maximum Price Regulation was operative, i. e., May 11, 1942 to October 26, 1942 (referred to in Par. IV to VI of complaint, R. 20-21). It merely confined the defense to alleged violations of Maximum Price Regulation 244, effective October 26, 1942 (R. 15). But for the purpose of discussion, we shall assume that the court intended to include in the phrase "all said times" the entire period covered by the complaint. The record is then in a state from which this Court may properly determine what the measure of damages shall be.

Under the amendment to Section 205 (e), it is settled that it is the violator seeking to avoid the assessment of damages beyond the amount of the overcharge who has the burden of pleading and proving that the violation was neither wilful nor the result of failure to take practicable precautions (*Bowles v. Sharp*, 149 F. 2d 148 (C. C. A. 8th, 1945); *Bowles v. Hastings*, 146 F. 2d 94 (C. C. A. 5th, 1944);

Bowles v. Franceschini, 145 F. 2d 510 (C. C. A. 1st, 1944)).

If wilfulness is shown to be present, then there is no more discretion vested in the district court under Section 205 (e) as amended to grant less than treble damages than there was prior to amendment. Congress obviously intended that the court might assess something less than treble damages only "in cases where violations occur unintentionally and despite the exercise of due diligence to prevent them" (Senate Banking and Currency Committee Report #922, 78th Cong., 2d Sess., p. 14. See also, Statement of Senator Wagner, in explanation of changes in Bill, 90 Cong. Rec. 5380). There was no intention whatever of saving anyone from treble damages who was a wilful violator and who failed to take practicable precautions. Senator Chandler, after whom the instant "Chandler defense" is named, made this plain as follows:

The case would go to court, and the allegation of an overcharge would be made. A violation of the OPA regulations would be alleged. The defendant in the case would prove, if he were able, that the overcharge were not wilful * * * He would also prove, if he could, that he used every reasonable precaution to try to observe regulations of the OPA. If he could not prove it he would lose, as he ought to lose. *It is not my intention to protect anyone who wilfully violated the law, or does not take reasonable and practical precautions to observe the regulations* (90 Cong. Rec. 5473). [Italics supplied.]

Reaffirming his intention not to aid the wilful violator by his amendment, Senator Chandler said:

I place two burdens upon the defendant both of which he must bear: first, that he did not wilfully commit the act. That is a matter of proof. *If he cannot prove that he did not wilfully commit the act he is stuck*, and I will not make a plea for him. Unless he is able to prove that he took all practicable precautions by reading the regulations to his employees and by trying to acquaint them with the regulations, he has not exhausted his responsibilities and good intent. It seems to me that if we do not agree with that contention we are not being fair to the American people (90 Cong. Rec. 5474). [Italics supplied.]

Not only is there lacking a single expression of intent to reduce the previous liability of a wilful violator, but on the contrary there was complete unanimity among those members of Congress who expressed themselves that intentional violations should continue to bear the full brunt of the treble damage provision.

Thus Senator Lucas declared:

The individual who knowingly and wilfully violates the directives of the Office of Price Administration, or the regulations or orders promulgated by it, should be penalized. So far as I am concerned in time of war there is no criminal penalty or damages heavy enough to be laid upon that kind of an individual (90 Cong. Rec. 5468).

Senator Radcliffe, a member of the Banking and Currency Committee, agreed with Senator Lucas, saying:

Under the present law if a case goes to trial and the overcharge is found to be a certain amount, the court has no discretion whatever except to assess triple damages. The court may come to the conclusion that there were extenuating circumstances, and that the imposition of triple damages would be unreasonable, but under the law there is no such judicial discretion. The Committee has attempted to cure that situation by providing that the damages may be from one and one-half to three times the amount of the overcharges, in the discretion of the court. *In cases where there has been a deliberate and flagrant attempt to flout the law, then, as the Senator from Illinois said a moment ago, triple damages should be imposed upon the one who has made the overcharge* (90 Cong. Rec. 5469). [Italics supplied.]

These statements made in the Senate by the author of the amendment and members of the Committee which reported it are entitled to great weight in determining its scope and purpose. So too, simple justice and the requirements of our emergency economy demand that the statute must be construed in such a manner as would not allow a deliberate violator to obtain the same benefits intended to be accorded the person whose conduct was not wilful and who took practicable precautions to avoid a violation.

The Eighth Circuit Court of Appeals has recognized the principle that a wilful violator should pay treble

damages. In *Bowles v. Sharp* (1945), 149 F. 2d 148, the Court said, at page 149:

We think the appellee should be given an opportunity, if he so requests, to offer evidence under the amendment. Unless further evidence shall be introduced judgment should be entered against the appellee for \$801.63 and costs as prayed. * * *

In *Bowles v. Biberman* decided September 21, 1945 (C. C. A. 3d) which was an action under Section 205 (e) of the Act as amended, and for injunction under Section 205 (a) of the Act, the court reversed the district court and instructed it to enter judgment for an injunction and for full treble damages against the defendant who violated a regulation in the face of two warnings that its acts were not permitted by it. The view that the assessment of damages is not discretionary in the case of a wilful violation has also been upheld in *Bowles v. Krasno Brothers Glove & Mitten Co.* (E. D. Wis., 1945) 59 Fed. Supp. 581, where the court said:

* * * Clearly the defendant in the case at bar did nothing to change its sales practice or avoid what was, as stated hereinbefore, in fact a violation. Therefore, the court has no discretion in the award of damages and must order treble damages.

In the light of these comments and authorities and also the evidence to be discussed below, we submit that

*"Wilful," as used in the Act does not necessarily involve bad faith or bad purposes; it means merely "purposeful" or "obstinate" as distinguished from "accidental." (See, *Zimberg v. United States*, 142 F. 2d 132, 137 (C. C. A. 1st, 1944) cert. denied 65 S. Ct. 38.

defendant should be held liable for treble damages. Here, it not only failed to sustain the burden imposed upon it by the Act but, with all deference to the court below, its conduct was in complete disregard of the Regulations almost from the time price control went into effect, until the day of the trial, and for that matter, under the lower court's approval is still in violation. We think a summary of defendant's conduct in chronological form, although somewhat repetitious of what went before, will suffice to make this clear beyond a shadow of a doubt.

(1) April 14, 1942—defendant revised its prices on sales made to the purchasers named in complaint.

(2) May 11, 1942—the GMPR went into effect making March 1942 the base period.

(3) July 1, 1942—Procedural Regulation No. 6 went into effect,⁹ allowing a dealer like defendant to

⁹ Procedural Regulation No. 6 issued July 1, 1942 (7 F. R. 5087), as amended, reads (§ 1300.401) :

“Any person who has entered into or proposes to enter into a government contract or a subcontract under any such contract, who believes that an established maximum price impedes or threatens to impede production of a commodity or supply of a service which is essential to the war program and which is or will be the subject of such contract or subcontract may apply for adjustment of that maximum price in the manner set forth below.

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“After an application has been filed and pending the issuance of an order granting or denying the application, the applicant may enter into or offer to enter into contracts and may make deliveries at the price requested in the application. If the order issued denies the application in whole or in part, the contract price shall be revised downward to the maximum price ordered, and if any payment has been made at the requested price, the applicant may be required to refund the excess. * * *”

With the exception of a few regulations which are expressly named, Procedural Regulation No. 6 applies to nearly all of the

contract to sell upon an adjustable price plan provided an application for adjustment was filed; and shortly thereafter defendant was advised to comply with the Regulation.

(4) September 14, 1942—defendant was advised by letter (R. 256-257) that prices to Willamette Iron and Steel Company were prices at which deliveries were made to that company in March and that “This price can be increased only on the basis of an application for adjustment” (R. 257) pursuant to Procedural Regulation No. 6.

(5) October 26, 1942—MPR 244 went into effect superseding the GMPR. Under it, like the GMPR, in conjunction with Procedural Regulation No. 6, defendant was allowed to sell under an adjustable price plan provided he filed an application for adjustment. No application was filed until March 10, 1943, but nevertheless defendant continued to sell in the interim at adjustable prices which were higher than the ceiling price. (See Findings VIII, XI, R. 22, 23.)

(6) March 10, 1943—defendant filed its application for adjustment.

(7) March 12, 1943—defendant was advised by Mr. Snow, Chief Enforcement Attorney of Portland, Oregon, that “application cannot be *acted* upon to permit you to quote the prices you request in your application until you have made a satisfactory adjustment on your past overcharges” (R. 255).

“In the meantime the Price Division permits me to say that they have already started to make an analysis

regulations which have been issued by the Administrator covering those commodities which were of use in the war effort.

of your application” (R. 256). (Note—no violations were charged in complaint after March 10, 1943.)

(8) April 2, 1943—(three weeks later) Mr. Snow advised defendant that it was now entitled to charge the prices requested in the application for adjustment.

(9) November 2, 1943—application for adjustment was denied by Administrator.

Section 1400.156 of MPR 244 requires party whose application for adjustment is denied by the *Administrator*, to revise the contract downward to the maximum price ordered.

Defendant did not obey the provisions of MPR 244 either when the Administrator denied the application on November 2, 1943, nor did it bring itself into compliance after the Emergency Court of Appeals upheld the Administrator’s order on September 28, 1944 (146 F. 2d 661 (E. C. A. 1944)) or thereafter.

(10) December 5, 1944 (trial date in this case) defendant admitted that ever since April 1942 it has maintained the prices raised at that time for the purchasers named in the complaint and is still charging them (R. 259).

In other words, for a period of over two years defendant has consistently flouted the Act and Regulations and intends to continue to do so (R. 259). Surely, “good faith” within the meaning of Section 205 (e) of the Act has not been shown merely because the purchasers in this case have been allowed to retain the overcharges under an agreement providing for adjustable prices. As shown above, for the period referred to in the complaint, these contracts were unlawful because under the express terms of the regulation they called for prices higher than the

established prices at a time when an application for adjustment was not filed nor pending.

While Section 205 (d)¹⁰ provides for no liability where anything is done or omitted to be done in "good faith * * * pursuant to * * * any regulation," this defense is not available to one whose action or omission is not "*pursuant*" to the regulation but is directly opposed to it (*Bowles v. Indianapolis Glove Co.*, 150 F. 2d 597 (C. C. A. 7th, 1945); *Bowles v. Franceschini*, 145 F. 2d 510 (C. C. A. 1st, 1944)). In *Bowles v. Franceschini*, *supra*, the Court said:

The purpose of this section [sec. 205 (d)] is to protect those who act "pursuant to" the provision of, or regulations under the Act as distinguished from those who "violate" it. It does not appear that the sales made in good faith in the instant case were made "pursuant to" any provision or regulation under the Act. * * *

If there was no "good faith" present within the meaning of Section 205 (d), that element was lacking also for the purposes of Section 205 (e). So far as practicable precautions were concerned to prevent the occurrence of violations as required by Section 205 (e), it is plain that defendant has taken every precaution to perpetuate his wrongful acts instead of taking

¹⁰ (d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply * * *.

pains to avert them. We submit that treble damages would not be too high a price to pay by a defendant who has so deliberately and callously disregarded an Act "born of the exigencies of war" for the protection of the public against inflation. (See *Taylor v. United States*, 142 F. 2d 808, 817 (C. C. A. 9th, 1944), cert. denied, 65 Sup. Ct. 56.) "The case is not therefore one in which a party acted in innocent confusion, but rather one in which, with deliberate awareness of the conflict, it elected to submit its rights to the court. In such a case it is our duty to let the chips lie where they fall" (Groner, C. J., concurring in *Rainbow Dyeing and Cleaning Co., Inc. v. Bowles*, supra).

III

Defendant's violations fully justified an injunction

In this case the district court held that the prayer for injunction fell with the dismissal of the action (R. 290). Apparently, since the court found that defendant had not violated the Act and Regulations, it believed no injunction was necessary to assure future compliance. This then, is not a case where the court attempted to exercise any discretion, and so the question of abuse is not present.

Under the circumstances, however, we submit that an injunction is essential to bring defendant into compliance. This is not a case where the alleged unlawful practices have been abandoned with a promise from defendant that there will be no resumption of them, which promise the court believes will be performed. Here the challenged practices are still continuing and defendant persists to this day in main-

taining that they are lawful.¹¹ Not only has defendant taken no vigorous or positive steps to discontinue or correct his omission to comply with the Act, as Maximum Price Regulation 244 required it to do where an adjustment is denied, but defendant makes no promise that it will do so, even if this appeal is decided adversely to it. In view of such defiance, failure to issue an injunction would be "tantamount to judicial expression of acquiescence in and toleration of the unlawful conduct, and no such discretion is vested in the court." (Cf. *Lenroot v. Interstate Bakeries Corporation*, 146 F. 2d 325, 329 (C. C. A. 8th, 1945), even if it had so been exercised in this case.

The principle to be applied in a case of this kind was well stated in *Walling v. Panther Creek Mines*, 148 F. 2d 604 (C. C. A. 7th, 1945), where Judge Kerner said (605):

* * * We emphasize the point that this is not a case where the alleged unlawful practices have been abandoned, and compliance effected, with the promise that they will not be resumed. On the contrary, the challenged practices are continuing, and defendant asserts that they are lawful. No promise has been made to discontinue or correct them. The trial court was of the opinion that the defendant may have committed violations of

¹¹ The fact that defendant vigorously defended its past conduct is of itself a sufficient threat that it will violate in the future as to warrant the issuance of an injunction. (*Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (C. C. A. 7th, 1919); *Otis & Co. v. Securities & Exchange Commission*, 106 F. 2d 579 (C. C. A. 6th, 1939); *Fleming v. Jacksonville Paper Co.*, 128 F. 2d 395 (C. C. A. 5th, 1942)).

the Act, and if it did, the violations were only "technical." Thus the question boils down to whether the practices are illegal, for if they are, since the standards of the public interest, not the requirements of private litigation, measure the need for injunctive relief, an injunction should be issued.

In *Bowles v. Meyers*, 149 F. 2d 440 (C. C. A. 4th, 1945), Judge Parker said with equal cogency (at p. 444):

The principle upon which the foregoing cases were decided has no application here, where defendants have made no attempt to comply with the order but have acted, and are continuing to act, in defiance of its provisions under claim that the director in making it has not complied with the provisions of the statute. Equitable considerations arising out of an attempt to comply with regulations might well convince a court that injunctive relief ought not be granted; but a refusal to obey regulations because they are thought to be invalid by one who does not adopt any of the means open to him of testing their validity falls within an entirely different category. *Bowles v. Nu Way Laundry Co.*, supra.

In *Bowles v. Biberman*, supra, Judge Biggs, speaking for the Third Circuit Court of Appeals, said:

The defendant has persistently violated the Act though it has now ceased to do so. It committed its violations after two warnings from the Administrator that its charge of the 8½% wage increase into its direct labor costs was not permitted under the Regulations.

True, it ceased these violations on January 29, 1944, about four months before the complaint in the suit at bar was filed. * * * Since the defendant engaged in acts prohibited by the statute the court below erred in not granting the injunction.

The judgment is reversed and the cause is remanded with the direction to enter judgment for the plaintiff in accordance with the principles enunciated in this opinion.

Here there is even greater need to grant the injunction because defendant continued to violate the regulation after its application for adjustment was denied and after it had an opportunity to test its validity. In the words of this Court in *Bowles v. Sanden & Ferguson, Inc.*, supra, "The proof shows a complete disregard of the regulations with no situation comparable to *Hecht v. Bowles*, and * * * judgment should be reversed and the case remanded, with instructions to issue the injunction prayed for." (See also, *Bowles v. Simon*, 145 F. 2d 334 (C. C. A. 7th, 1944); *Bowles v. Nu Way Laundry Co.*, supra).

CONCLUSION

The gray iron castings industry in the prosecution of the war effort was of utmost importance. It is of equal importance for purposes of postwar rehabilitation. This commodity is used extensively in machine tools, engines, various types of machinery and mechanical equipment and many other products. In 1941 total sales of gray iron castings were estimated to be nearly 500 million dollars.¹² As a purchaser, directly

¹² Statement of Considerations for MPR 244, OPA Service 38:891 et seq.

or indirectly of these commodities for war use, the government had a real interest in preserving ceiling prices for them. Every unauthorized increase resulted not only in a wrongful taking of the public's money but likewise in a diversion of funds which could be used to finance the myriad number of other important war and peacetime requirements. The public is even more directly affected by any unauthorized increase in the price of castings now. The need for drastic price control and enforcement is therefore essential here. Only treble damages and an injunction will deter a violator of defendant's character and others like it. There is far too much at stake to take any other course of action.

It is therefore respectfully submitted that the judgment of the district court should be reversed, and the cause remanded, with instructions to grant the full relief prayed for in the complaint.

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APPENDIX A

Analysis of Overcharges and Treble Damages From March 27, 1942, to March 10, 1943

Name of purchaser	Period of violation	Amount of overcharge	Calculated treble damages	Record reference	Finding of fact
Tuerck-MacKen-sie Co.	Aug. 21, to Oct. 26, 1942.	\$1,535.16	-----	R. 75 Ex. 8 ¹	cf. Finding VI R. 21.
	Oct. 28, to Dec. 20, 1942.	1,060.27	-----	R. 76 Ex. 9 ²	} Finding IX R. 23.
	Jan. 14, to Feb. 27, 1943.	1,723.99	-----	R. 78 Ex. 10.	
	Total.....	\$3,319.22	\$9,957.66		
Bingham Pump Co.	Aug. 7, 1942, to Oct. 22, 1942.	2,036.23	-----	R. 85 Ex. 17.	cf. Finding VI R. 21.
	Nov. 9, 1942, to Dec. 31, 1942.	1,953.56	-----	R. 84 Ex. 15.	} Finding X R. 23.
	Jan. 5, 1943, to Mar. 10, 1943.	1,315.82	-----	R. 84 Ex. 16. ³	
	Total.....	5,305.61	15,916.83		
Willamette Iron & Steel Corp.	Oct. 26, 1942, to Dec. 31, 1942.	3,646.20	-----	R. 88 Ex. 20, 21. ³	
	Total.....	3,646.20	10,938.60	-----	Finding XII R. 24.
Iron Fireman Mfg. Co.	Mar. 27, 1942, to Dec. 30, 1942.	3,897.51	-----	R. 94 Ex. 24.	cf. Finding XIV R. 25.
	Total.....	3,897.51	11,692.53		
	Total overcharges.	16,168.54	48,505.62		

¹ Complaint amended to conform to proof (R. 184).

² Complaint amended to conform to proof (R. 94).

³ Exhibits omitted from record by stipulation (R. 295).

APPENDIX B

PROVISIONS OF THE ACT AND REGULATIONS

The action involves the Emergency Price Control Act of 1942 (50 Stat. 23, 50 U. S. C. App. Sec. 925) as amended by the Stabilization Extension Act of June 30, 1944 (Pub. L. No. 383, 78th Cong.; 2nd Sess.), and two regulations issued thereunder, the General Maximum Price Regulation (7 F. R. 3153) and Maximum Price Regulation No. 244 as amended (7 F. R. 7871). The alleged violations are overcharges in the sale of gray iron castings between May 11, 1942, and March 11, 1943.

(1) *The statute.*—Section 2 (a) of the Act provides that when prices have risen or threaten to rise to an extent inconsistent with the purposes of the Act, the Price Administrator may by regulation establish such maximum prices as will be fair and equitable and will effectuate the purposes of the Act.

* * * * *

Section 4 (a) provides that it is unlawful regardless of any agreement made to sell or deliver any commodity in violation of any regulation under Section 2, or offer to do any of the foregoing.

* * * * *

Section 205 (a) provides that:

Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a

showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

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Section 205 (e) as amended by the Stabilization Act of 1944 (Pub. Law 383, 78th Cong., 2d Sess.) provides in part:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.*¹

¹ As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

“* * * bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court.”

* * * *such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.*²

Pursuant to the authority vested in him by Section 2 of the Act, the Administrator issued the regulations which are involved in this case.

(2) *Application of the General Maximum Price Regulation, hereinafter referred to as GMPR.*—As to violations alleged to have occurred from May 11, 1942, until October 26, 1942, the GMPR, issued April 28, 1942, and effective May 11, 1942 (7 F. R. 3153), was applicable.

The pertinent portions of this regulation are as follows:

SECTION 1. *Prohibition Against Dealing in Commodities or Services Above Maximum Prices.*—On and after the effective date of this regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation; and

(b) * * *

SECTION 2. *Maximum Prices for Commodities and Services—General Provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

² Sec. 108 (c) of Stabilization Extension Act of 1944.

(b) * * *

“Highest Price Charged During March 1942.”

For the purposes of this Regulation, the highest price charged by a seller “during March 1942” shall be:

(1) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942;

* * * * *

No seller shall change his customary allowances, discounts, or other price differentials unless such change results in a lower price. *The “highest price charged” shall be a price charged during March 1942 to a purchaser of the same class.*

(k) *Purchaser of the Same Class.* “Purchaser of the same class” refers to the practice adopted by the seller in setting *different prices* for commodities or services for sales to *different purchasers* or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale. [Italics ours.]

(3) *Application of Maximum Price Regulation No. 244 (hereinafter referred to as MPR 244).*—As to violations alleged to have occurred from October 26, 1942 to March 11, 1943, MPR 244, issued October 24, 1942, and effective October 26, 1942 (7 F. R. 7871) was applicable.

The pertinent provisions of this Regulation are as follows:

§ 1421.151 *Maximum prices for gray iron castings.* (a) On and after October 26, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver gray iron castings, and no person shall buy or receive gray iron castings in the course of trade

or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1421.166; and no person shall agree, offer, solicit or attempt to do any of the foregoing: *Provided*, That (1) if the purchaser shall receive from the seller a written affirmation that to the best of his knowledge, information and belief the price charged does not exceed the maximum price established by this Maximum Price Regulation No. 244 and that the seller has complied with all other provisions (including the filing requirements of § 1421.161) of this regulation, and if in such case the purchaser shall have no knowledge of the maximum price and no cause to doubt the accuracy of the affirmation, the purchaser shall have complied with this section; and (2) where the contract of sale has been entered into on or before October 25, 1942, the parties thereto may make and accept deliveries of the castings required or specified in such contract and the seller may render bills or invoices for such castings to the purchaser at the contract price, subject to adjustment of said price in accordance with the maximum prices established by this Maximum Price Regulation No. 244 within a period not to exceed 30 days after the billing or invoicing.

* * * * *

§ 1421.152 *Applicability of General Maximum Price Regulation.* The provisions of this Maximum Price Regulation No. 244 supersede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this regulation.

§ 1421.156 *Adjustable pricing and pricing during the pendency of an application for adjustment or petition for amendment.* (a) It is permitted under this maximum price regulation to provide in a contract that the price shall be adjustable to a price not higher than the

maximum price in effect at the time of delivery.

(b) *Where an application for adjustment has been filed pursuant to § 1421.157 (a) of this regulation and the applicant claims to meet the requirements of subparagraph (3) under paragraph (a) of said section, he may, pending the issuance of an order granting or denying the application and without securing the express permission of the Office of Price Administration, enter into or offer to enter into contracts and may make deliveries at the price requested in the application. In an appropriate situation, where a petition for amendment or application for adjustment requires extended consideration and the applicant or petitioner does not claim to meet the requirements of subparagraph (3) under § 1421.157 (a), the Administrator or, in a case properly before him, the regional administrator for the appropriate regional office of the Office of Price Administration may, upon application, grant permission to the applicant or petitioner to enter into or offer to enter into contracts and to make deliveries at the price requested in the application or petition. Whether or not the applicant or petitioner claims to meet the requirements of subparagraph (3) under § 1421.157 (a), if the order issued denies the application or petition in whole or in part, the contract price shall be revised downward to the maximum price ordered, and if any payment has been made at the requested price, the applicant or petitioner shall be required to refund the excess. If a request for review is filed by the applicant seeking an adjustment in accordance with § 1300.17 of Revised Procedural Regulation No. 1, the applicant, pending action by the Administrator, may enter into or offer to enter into contracts and may make deliveries at the price requested in the application. If the order issued by the Administrator denies the application in whole or in part, the contract price shall be revised downward to the*

maximum price ordered, and if any payment has been made at the requested price, the applicant shall be required to refund the excess. [Italics ours.]

§ 1421.157 *Petitions and applications for amendment, adjustment or exception.* (a) Any seller of gray iron castings may file an application for adjustment of his maximum prices for any or all such castings: *Provided*, That he is prepared to show:

(1) That his maximum prices for such castings are below his costs of producing them, or are inadequate to maintain continued production of such castings, and

(2) That such castings are necessary to the war effort, and either

(3) That he has entered into or proposes to enter into Government contracts or subcontracts under such contracts for the sale of such castings, or

(4) That unless adjustment is granted applicant will cease or will not undertake production of such castings, and as a result the purchaser will be materially handicapped in its operations for one or more of the following reasons:

(i) Applicant possesses special knowledge and experience in the production of such castings,

(ii) No other foundry properly equipped to produce such castings is located within a convenient distance of purchaser,

(iii) There is a general shortage in the type of facility possessed by applicant for the production of such castings,

* * * * *

§ 1421.166 *Appendix A: Maximum prices for gray iron castings—*(a) *Base period maximum prices.** (1) Where the casting to be

*Examples of the method of computing base-period maximum prices are as follows: Assume that the seller sold or offered for sale

priced is identical with a casting which the seller sold or offered for sale in the period between August 1, 1941, and February 1, 1942, the maximum price for such casting is the highest net price at which the casting was sold or offered for sale by the seller during such period: *Provided, That the maximum price for such casting to a purchaser to whom the casting was sold or offered for sale by the seller in the period between August 1, 1941, and February 1, 1942, shall be the highest net price at which the seller sold or offered for sale the casting to such purchaser during such period.* As used in this paragraph (a), the term "net price" means the price at which the casting was sold or offered for sale, adjusted for the seller's applicable customary charges, discounts, quantity differentials, and allowances in effect between August 1, 1941, and February 1, 1942. [Italics ours.]

in the period between August 1, 1941 and February 1, 1942 (hereinafter referred to as the "base period") to purchasers A and B, but not to purchaser C, a casting which is identical to the casting to be priced and that the highest net prices to purchasers A and B in the base period were 7¢ and 8¢ per pound, respectively. If the seller proposes to sell the casting to C, his maximum price is 8¢ per pound (subject to the provisions of § 1421.166 (a) (3) on overtime). The seller's maximum price to purchaser A would be 7¢ per pound and to purchaser B would be 8¢ per pound (subject to the provisions of § 1421.166 (a) (3) on overtime).

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

vs.

CRAWFORD AND DOHERTY FOUNDRY
COMPANY, an Oregon corporation,

Appellee.

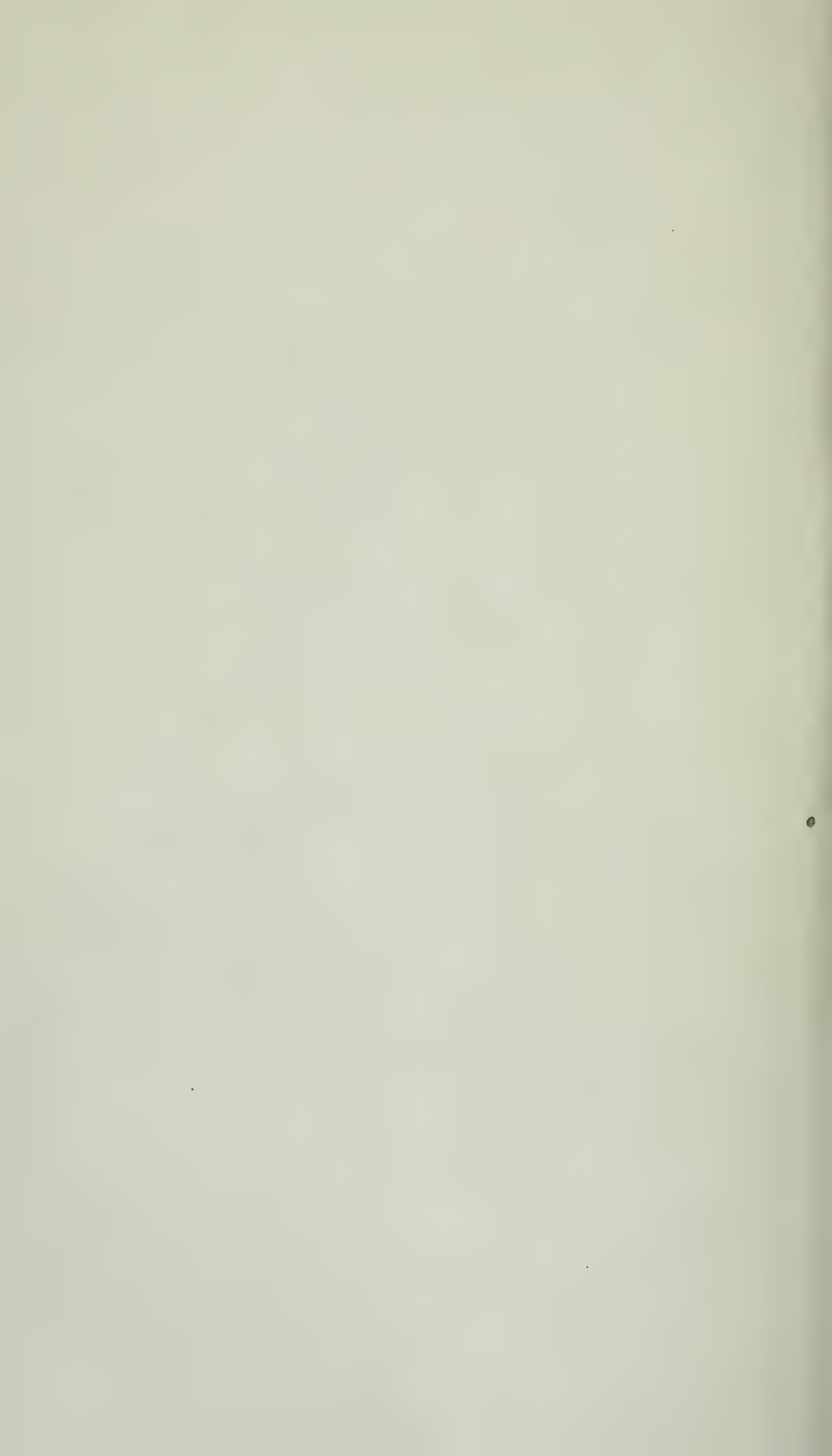
APPELLEE'S BRIEF

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FILED

JUL 10 1948

PAUL P. O'BRIEN
CLERK



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Appellee.

APPELLEE'S BRIEF

ADDITIONAL STATEMENT

Appellant has omitted from his "Statement of the Case" facts which we consider are pertinent to the consideration of this case on appeal. We are, therefore, directing the attention to certain additional facts.

Appellant's right to prevail on this appeal is dependent entirely upon whether there is any evidence to support the Findings of Fact made by the lower Court. If the findings are supported by evidence and are not clearly erroneous, then the lower Court's judgment must be sustained.

These findings relate to two distinct questions:

First: Those which bear upon that part of Appellant's complaint relating to the alleged violations of the General Maximum Price Regulation, and

Second: Those which bear upon that part of Appellant's complaint relating to the alleged violations of Maximum Price Regulation 244.

As to those falling under the first heading, attention is directed to the fact that this case was tried in the lower court by the attorneys for the Appellant on the theory that it was a question of fact as to whether or not the prices charged to the Marine Electric Co. during the month of March, 1942, were *for the same commodities* sold to Tuerck-MacKenzie, Bingham Pump Co., and the others referred to in Appellant's complaint; and further, that it was a question of fact as to whether Marine Electric Co. was *a purchaser of the same class* (R-38 to 49, 199 and 200) as Tuerck-McKenzie and others.

As to the Court's findings which relate to the part of the complaint bearing upon Maximum Price Regulation 244, we direct attention to the following circum-

stances: Preceding the effective date of MPR 244, Don B. Card, Secretary-Treasurer of Appellee, made several visits or calls at the Portland office of the Office of Price Administration (R-246, 247) for the purpose of obtaining an interpretation of General Maximum Price Regulation and MPR 244 as they appertained to Appellee's system of fixing prices on Meehanite gray iron castings then being sold by Appellee to its customers. Such interviews left Mr. Card in a state of bewilderment and confusion, and to avoid any possible charge of violating either the spirit or the wording of MPR 244, Appellee entered into agreements with its several customers that it would submit invoices at an advanced price which it was endeavoring to have approved, but that the customers would pay Appellee only the amount approved by the OPA. (Findings VIII, IX, X, XI, XII — R-219 et seq.). Sales made after October 26, 1942, to the purchasers under consideration were made only pursuant to the foregoing arrangement.

The fact that Appellee had the agreement with its various customers not to collect the additional amounts unless such increased prices were approved by the OPA was known by Appellant before instituting this suit (R-21 Ex. 29). Appellee adduced evidence to support the foregoing contention and the Court made a finding thereon and upon that Finding based a conclusion that the Appellee had not violated MPR 244.

SUMMARY OF ARGUMENT

This Court has before it only the question whether or not the Findings of Fact of the lower Court are clearly erroneous (Court Rule 52-a). We assume that it will be conceded that if there is evidence to support the Findings, the decision of the lower Court should be affirmed on the assumption that the Judge of the lower Court had an opportunity to judge of the credibility of the witnesses (Rule 52-2). The question of the sufficiency of the evidence may be divided into two parts: first, that which supports the Findings bearing upon the alleged violations of GMPR, and second, that bearing upon the alleged violations of MPR 244.

As to the alleged violations of GMPR, Appellee contends as to the Findings made thereon that:

(a) Appellant tried this case in the lower Court on the theory that it was a *question of fact* as to (1) whether or not the prices of Marine Electric Co. for the month of March, 1942, were *for the same commodities* as sold to Tuerck-MacKenzie and others, and (2) whether Tuerck-MacKenzie and others were *purchasers of the same class* as Marine Electric Company within the contemplation of GMPR; and, therefore, Appellant may not be permitted in this court to assert a different theory, that is, that *purchasers of the same class* means that each purchaser is a class unto himself; and

(b) The lower Court's Findings to the effect that the prices of Marine Electric Co. for month of March, 1942, were for "similar castings" and that Marine Electric Co. is "*a purchaser of the same class*" as Tuerck-MacKenzie and the others referred to in Appellant's complaint are conclusive on this Court as Findings of Fact.

As to the alleged violation of MPR 244, Appellee contends that the evidence conclusively supports the lower Court's Findings that the deliveries of the commodities to Tuerck-MacKenzie and others were made only under an arrangement whereby prices would be paid on the basis of those fixed by Office of Price Administration, and all in excess of OPA prices as indicated by invoices to be rendered would be withheld by the purchasers pending a determination of Appellee's right to demand and receive increased prices. Appellee further contends the question of sale and delivery is one of fact and that the arrangement just referred to did not constitute a sale in violation of the OPA regulations within the contemplation of the Emergency Price Control Act of 1942, and such Findings are conclusive on this Court as to such facts.

ARGUMENT IN RE APPLICATION OF GENERAL MAXIMUM PRICE REGULATION

The lower Court by Finding VI (R-21) determined as a fact:

(a) That Appellee during the month of March, 1942, sold to Marine Electric Co. of Portland, Oregon, castings similar to those sold to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron & Steel Corp., and Iron Fireman Mfg. Co., and

(b) That the prices charged Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron & Steel Corp., and Iron Fireman Mfg. Co., during the period from August 1, 1942, to October 26, 1942, did not exceed the highest prices charged to said Marine Electric Co. during the month of March, 1942, for similar castings.

The subject matter of Finding VI was one of fact. An issue of fact had been tendered by the pleadings which was susceptible of proof or disproof. Evidence was offered and received without objection on this issue. Appellant, although privileged to move to have the Finding amended or to make additional findings, did not do so. (R-270, 272).

Appellant in this court by specifications of Error 4 (R-11) assigns error by the Court in making Finding VI. Appellant attempts no review of the evidence that was offered on this issue but argues from the

premise that the words: "the highest prices charged by the seller * * * for the same commodity * * *" is susceptible of only the interpretation that "commodity" refers only to the commodities sold to the particular customer. Appellant asserts (R-15) that the language admits of no other interpretation and the price criterion is made as clear as language can make it. Of course, exaggeration is not argument and it has no place in logic. Obviously if the writer of GMPR had intended to say "the highest prices charged by the seller during such month for the same commodity or service *to the same customer*", he would have so written the regulation.

In other words, if GMPR had been intended to freeze the price to each customer at the price that customer had been sold the commodity during the month of March, 1942, it would have been very easy to have so provided. The words "to the same customer" were neither used nor can they by the ordinary rules of construction be implied in the language used. According to the plain import of the language used the object of the regulation was to freeze the price of "the commodity", not the particular price between the manufacturer and each of his customers.

APPELLANT MAY NOT ASSERT THEORY IN
APPELLATE COURT DIFFERENT THAN
CONTENTIONS IN TRIAL COURT

Appellant initiated this case by a complaint wherein he based the right of recovery under GMPR (Par. IV R-4) upon the fact that the Appellee sold Meehanite gray iron castings during the period from May 11, 1942, to October 26, 1942, *at prices higher than the maximum prices for which Appellee sold said commodities to a purchaser of the same class during the month of March, 1942.*

These allegations were denied by Appellee and thereby an issue of fact was raised, not as to whether Appellee sold to purchasers at prices higher than such particular purchasers had paid in March, 1942, but at prices higher than paid by a *purchaser of the same class.*

Counsel for Appellant at no time claimed that the regulation insofar as "purchaser of the same class" is concerned meant the particular purchaser. Appellant's position throughout the trial was that it was a question of fact (R-38-49). We direct special attention to the following statement by Appellant's counsel in the lower Court (R-41, 42) :

" * * Our position is that on the four customers that were involved in this particular action, namely, Tuerck-MacKenzie Company, and Bingham Pump Company, and Willamette Iron & Steel Corporation, and the Iron Fireman Manu-

facture Company, that the first two stated purchasers of the same class, that the (10) other two also were purchasers of the same class but still a different class.

“Now just what is a purchaser, or what are the items or facts that go to make up or determine whether or not a purchaser falls into one class or another, seems to me involves a number of other things than just looking to the particular casting or to the fact that the same or similar metal might be used in a casting. I think any classification of a purchaser that we have to look to their dollar volumes, any discounts that might be granted, credit items, and the average poundage that is sold to the particular purchaser.

“I think, as does Mr. Henderson, that the size and the shape of the casting has something to do with it. There is a matter that seems to me very important. That is the location of the purchaser. That is, whether he is—whether deliveries can readily be made, whether he is accessible to the facilities of a seller. Then of course to me the most important thing to determine whether or not a purchaser falls within the same class is the price that was charged. I think that is probably the most important item to consider.

“Now, as I say, I don’t agree with Mr. Henderson’s idea of the formula or the rule which he seeks to establish, but I do feel that the whole question is one of fact and Mr. Henderson has, of course, the privilege of putting on any testimony, any evidence in support of his contention, (11) and of course we have that privilege, too, and it is then up to the Court to determine, as a matter of fact, whether or not the prices are to be governed by those charged to the Marine Electric Co., or to be governed by the previous charges to these same purchasers here.”

And again (R-45 and 46) :

“Mr. Wagner: Well, our position, Mr. Henderson, is that the Marine Electric Company prices during March of 1943, or during the other freezing period, August of 1941 to February 1st of 1942, does not govern the prices for the four purchasers that are involved and set forth in the complaint. That is, the Marine Electric in our position is a very small purchaser. They are purchasing items that are not at all comparable to the castings that are involved here, and, therefore, those prices cannot govern the prices for castings which were sold to Tuerck-MacKenzie, or Bingham Pump, nor can those prices govern the castings which Crawford and Doherty sold to Willamette Iron & Steel and the Iron Fireman Company. Those are entirely different types of castings, and they are entirely different types of purchasers. That is our position. It would seem to me that if you wish to decide that the Marine Electric Company—that their freezing date prices are the governing ones, you certainly have that privilege, but then it comes down to this question of fact we are discussing: As to what is the customs of the same class, whether or not these prices govern or whether these particular prices govern that were taken from the previous records of Crawford and Doherty to the same buyers.

“The Court: To the same buyers?”

“Mr. Wagner: Yes, with the exception of Iron Fireman Manufacturing Company. They had no purchases during the freeze (15) periods, but we contend that the prices at which Willamette Iron & Steel Corporation were sold castings governs there, because of the identical size and especially of a casting which was for Liberty Ship motors.”

We also direct attention of the Court to a response made by Appellant's counsel to a question by the Court, (R-199) :

"The Court: Let me ask my question this way: If Mr. Henderson made his point stick about the Marine Electric, would that throw \$3500 off of this \$16,000, or would it leave only \$3500 in your claim? Which way does that go?

"Mr. Wagner: It would throw it off of the sixteen thousand. But let me explain just a little bit further, if the Court please. The Marine Electric had a higher price than is set forth during March of 1942 in the bill of particulars, then (121) that would reduce the \$16,168 by the \$3500, if it were determined that the Marine Electric Company were a purchaser of the same class.

"The Court: I understand. That is all true.

"Mr. Wagner: But as to the other sales General Maximum Price Regulation 244, as to all four of the concerns, I think the proviso governs and that each concern is governed by its base price; that is the highest net price charged during the base period to it as a customer, itself.

"The Court: But Iron Fireman wasn't in business?

"Mr. Wagner: Iron Fireman falls within the first classification of that same proviso under 244, namely, that the maximum price would be the highest net price at which the seller sold or offered for sale such casting to a purchaser of the same class during that period that just precedes the proviso. Now Willamette Iron & Steel and Iron Fireman we say are purchasers of the same class.

"The Court: Purchasers of the same class?

"Mr. Wagner: Yes.

"The Court: But if he also qualifies Marine Electric—

"Mr. Wagner: As a purchaser of that class:

"The Court: Yes—that would throw out Iron Fireman?

"Mr. Wagner: Iron Fireman.

"The Court: And Iron Fireman is about \$3400?

"Mr. Wagner: \$3897. (122)

“The Court: Then if he makes his point stick he would throw out \$3500 plus \$3800?”

“Mr. Wagner: That is right.”

All testimony adduced by Appellee to establish prices of Marine Electric Company in March, 1942, was received without objections by counsel for Appellant (R-181-185, 194) as not being competent to prove the “highest price charged by a seller for a particular commodity”. In this connection counsel for Appellant attempted by a cross-examination of V. O. Stirnweis (R-193, 185 et seq.) to establish the fact that Marine Electric Company was of a different class than Tuerck-MacKenzie and the other purchasers referred to in Appellant’s complaint.

When Appellee offered in evidence price quotations (Ex. 27) from Appellee to Marine Electric Company, the only objection offered thereto by counsel for Appellant was that “it was not evidence of a delivered price” (R-204-5-6). Counsel made no objection that evidence as to the prices by Marine Electric Company was not competent and material under GMPR.

When V. O. Stirnweis, witness for Appellee, was interrogated (R-21) as to the application of the prices of Marine Electric Company to those of Iron Fireman as shown by Ex. 28, counsel for Appellant made no objections to the competency or materiality of such evidence under GMPR. Don B. Card, Secretary-Treasurer of Appellee was called as a witness and testified (R-233-245) in respect to the price schedule of the

Marine Electric Company as the same related to prices charged to Tuerck-MacKenzie and others. All of this evidence was received without any objection by Appellant insofar as the same related to establishing a base price under GMPR on the prices of Marine Electric Company. Appellee's Exhibit 30 is a comparative price schedule showing prices to Marine Electric Company during March, 1942, and prices for sales to Bingham Pump Company and Tuerck-MacKenzie Company during July, August, September, and October of 1942. When this exhibit was offered (R-233), counsel for Appellant in specifying his objections to this exhibit said:

“ * * * The exhibit reflects figures that are nothing more than conclusions, conjectures and opinions, and establishes nothing which indicates deliveries of any castings at any particular prices.”

No intimation was made that it was incompetent or irrelevant because under the Regulation the price *to the particular purchaser* was the proper base.

Exhibit 31 is made up of eleven copies of invoices rendered by Appellee to Marine Electric Company in January, 1942. Exhibit 32 is made up of seven copies of invoices rendered by Appellee to Marine Electric Company in March, 1942. When Exhibits 31 and 32 were offered in evidence, Appellant made no objection that they were incompetent or irrelevant because under the Regulation *the price to the particular purchaser only* would be admissable. Counsel for Appel-

lant specified the basis for the objections (R-243) in the following language:

“That there is no evidence to establish the fact that this purchaser is one in the same class as any other purchaser involved in this controversy.”

Counsel by this objection gave recognition to the fact that the question of “class” was one of fact and that the question before the Court was whether or not Marine Electric Company belonged to the same class as Tuerck-MacKenzie and the others. Counsel for Appellant elaborated his position on his objection in a colloquy with the Court that ensued immediately after the objection was made as follows (R-243):

“The Court: Well, you always are very fair. I admire you for being distinct like that. But passing whether they are of the same class, they would have a bearing, wouldn’t they?”

“Mr. Wagner: No, your Honor. I tried to make that clear a short while ago in the difference in the method of pricing that is being used here.

“The Court: You mean per—

“Mr. Wagner: Per each casting and not per pound of the casting.

“The Court: Well, passing that question also, if from your point of view they were priced the same, and this purchaser was in the same class, they would have a bearing?”

“Mr. Wagner: There still is the question of whether or not the casting is substantially the same casting.

“The Court: Well, passing that——(151)

“Mr. Wagner: Well, those are the grounds of the objection.

“The Court: Yes; I understand; but passing

all of those things, they would have a bearing on the statute and regulation, wouldn't they?

"Mr. Wagner: Yes, that is true, as to the point of time only.

"The Court: As to what?

"Mr. Wagner: As to the point of time, excluding—

"The Court: Yes.

"Mr. Wagner: —excluding, of course, all the other things.

"The Court: I understand. But how would they work, laying those other questions aside? I want the benefit of your calculation.

"Mr. Wagner: Well, those are about the only questions, as far as pricing is concerned, your Honor. As to Regulation 244 they can't apply.

"The Court: Cannot?

"Mr. Wagner: They cannot apply.

"The Court: Why?

"Mr. Wagner: Because of the requirement that the subsequent pricing be maintained on a per customer basis.

"The Court: 244?

"Mr. Wagner: Yes; M.P.R. 244.

"The Court: I never heard your side of that. I want to hear you now. (152)

"Mr. Wagner: As to General Price Maximum Regulation they would probably have some hearing.

"The Court: They would, wouldn't they?

"Mr. Wagner: Yes. That is, the March, 1942, deliveries would have some hearing; that is, assuming you could say the price was the same and the class of purchaser was the same."

The only rebuttal offered by Appellant was directed (R-261-266) to the sole question of whether or not Marine Electric Company belonged to *the same class of purchasers* as Tuerck-MacKenzie and others.

All of the foregoing demonstrates that Appellant tried this case in the lower Court on the theory that the question of whether or not a person was a *purchaser of the same class* was a question of fact. It is a rule apparently of universal application that parties in an appellate court are restricted to the theory on which the cause was prosecuted or defended in the court below.

This Court in the cases of *FORD MOTOR CO. vs. FARRINGTON*, 245 Fed. 850; and *CUTLER vs. COOK*, 78 Fed. 863; considered appeals from the District Court of Oregon and in both cases held that it would not consider contentions of Appellants that were contrary to the theory upon which the case was tried in the lower court. The following are but a few Federal Court cases that may be cited that have followed this rule, to-wit:

NEW YORK ALASKA GOLD CO. vs. WALBRIDGE, 38 Fed. 2nd 199.

COMMERCE TRUST vs. WOODBURY, 77 Fed. 2nd 478.

PARROT ESTATE CO. vs. McLAUGHLIN, 89 Fed. 2nd 188.

BEECHWOOD SECURITIES CORP. vs. ASSOCIATED OIL CO., 104 Fed. 2nd 537.

Appellant tried this case in the lower court on the theory that "purchaser of the same class" meant purchasers buying the same commodities under similar conditions and that whether or not commodities were similar and the conditions were similar were questions of fact to be determined by the Court. The lower

Court resolved or decided those questions. We, therefore, submit that Appellant may not now urge this Court to consider a contention that the GMPR means that each purchaser is in a class by himself. We submit that Appellant's contention in respect to all parts of the complaint predicated on GMPR is without merit.

**FINDINGS OF FACT OF TRIAL COURT WILL
NOT BE SET ASIDE ON APPEAL UNLESS
CLEARLY ERRONEOUS**

It was the general rule of Circuit Courts of Appeal that they would not disturb the Findings of Fact of a Trial Court unless the same were clearly erroneous, even before this rule was promulgated by the Court as Section (a) of Rule 52. It also was the rule of Court that it would give due regard to the fact that the Trial Judge had an opportunity to see the witnesses while on the witness stand and, therefore, was in the better position to determine their creditability. We, therefore, will assume as a premise that this Court will not disturb the findings of the lower Court unless the Appellant is able to demonstrate that the findings clearly are erroneous.

The Court, by Finding VI (R-21) concluded as a fact that Appellee sold Marine Electric Company of Portland, Oregon, during the month of March, 1942, castings similar to those sold Tuerck-MacKenzie Company and others during the period from August 20,

1942, to October 26, 1942, and that Marine Electric Company was a purchaser of the same class as Tuerck-MacKenzie and others.

Appellant has not attempted to demonstrate that the evidence adduced in support of this Finding does not as a matter of fact support the Finding. Appellant has, instead of reviewing the evidence, cited (B-15) an official interpretation made on August 20, 1942, and another made on September 22, 1942, for the apparent purpose of demonstrating that it is imperative upon the Court to construe GMPR as meaning that a "purchaser of the same class" means each particular purchaser is a class unto himself. Counsel has also cited the cases of *BOWLES VS. NUWAY LAUNDRY Co.*, 144 Fed. (2d) 741; and *RAINBOW DYEING AND CLEANING Co., INC.*, 150 Fed. (2d) 273, to the effect that "purchaser of the same class" means that each purchaser is in a class by himself.

These interpretations at the most are merely attempts of individuals to place a meaning upon the words and language used in connection with GMPR. These interpretations do not compel the conclusion that regardless of the facts of a particular case it must be held as a matter of law that several different parties *are not in the same class*. The lower Court has found as a fact that Marine Electric Company and others belong to the same class of purchasers of the Appellee. These interpretations may not be invoked to demonstrate that what a Court has found to

be a fact is not in effect such a fact.

In this connection we would direct attention to Bulletin No. 1 issued April 28, 1942, by the OPA on "The General Maximum Price Regulation". We quote from Section 2 thereof appearing on pages 2 and 3 of that Bulletin:

**"HIGHEST PRICE CHARGED DURING
MARCH, 1942**

"For the purposes of this Regulation, the highest price charged by a seller 'during March, 1942,' shall be:

"(1) The highest price which the seller charged for a commodity *delivered* or service *supplied* by him during March, 1942; or

"(2) If the seller made no such delivery or supplied no such service during March, 1942, his highest *offering price* for delivery or supply during that month.

"No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price. The 'highest price charged' shall be a price charged during March, 1942, to a *purchaser of the same class*. But if during March, 1942, a seller (a) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (b) raised his general level of prices, but thereafter during March, 1942, made no delivery to any purchaser of a particular class, he shall, for that particular class of purchasers calculate the highest price charged by taking the highest price charged during March, 1942, to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differentials. No seller shall require any purchaser, and no purchaser shall be

permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March, 1942, on deliveries or supplies of the same or similar types of commodities or services.

“SIMILAR COMMODITIES OR SERVICES”

“One commodity shall be deemed ‘similar’ to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed ‘similar’ to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.”

We also quote from Section 20 which is devoted to “Definitions and Explanations” as set out on Pages 10, 11, 12 and 13 of the Bulletin. We direct special attention to the definition of “purchaser of the same class” as set out in sub-paragraph (k) of this Section (Bulletin, page 12) :

“This Regulation, and the terms appearing therein, unless the context otherwise requires, shall be construed as follows:

* * * * *

“Purchaser of the same class refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for

example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.”

It is perfectly apparent from the foregoing that the words “purchaser of the same class” were used in GMPR in their ordinary sense and not to mean each purchaser as a class unto himself. If GMPR had the meaning as contended for by Appellant, why was the definition of “purchaser of the same class” worded as it was worded? Why did not the author of Bulletin No. 1, when he came to the words “purchaser of the same class”, write “purchaser of the same class means that each purchaser is a class unto himself? It seems to us that such would have been a simple way of saying what counsel for Appellant says GMPR means. Why should the author of Bulletin No. 1 in writing the definition for the “purchaser of the same class” suggest the several attributes or characteristics that might be common to different purchasers if, as a matter of fact, he meant that each purchaser was a class unto himself? The answer is obvious. At the time GMPR was promulgated, the words “purchaser of the same class” meant what the definition set forth indicates they meant.

We finally get back to this consideration. Is there anything in the interpretations suggested by Appellant that compels the conclusion that the words “purchaser of the same class” in all instances mean each

purchaser is a class unto himself? Are not the interpretations cited by Appellant susceptible of the interpretation that in certain or particular instances the words "purchaser of the same class" means each purchaser is a class unto himself, but that there may be instances where several purchasers may belong to the same class. In other words, is it not a question for the Court to determine whether or not under GMPR several persons may or may not be "purchasers of the same class"? Does not each case predicated upon GMPR depend upon the particular facts of that case?

It would seem to us that all of these questions must be answered to the effect that whether or not under GMPR purchasers belong to the same class is a question of fact to be determined by the Court in each particular case. In other words, what belongs to a class (assuming the word is used with its ordinary connotations), is a question of fact. If, therefore, in a given case a Court decides that a particular customer's relationship is so peculiar that no other customer belongs within the same class as such a customer, then the Court would decide as a question of fact that the particular customer belonged to a class of which he was the only one. If, on the other hand, the Court on evidence adduced decides that several customers belong to the same class, such finding of fact is conclusive, assuming there is evidence to support the same.

Appellant by its complaint alleged that Appellee sold to Tuerck-MacKenzie and others between May 11, 1942, and October 26, 1942, Meehanite gray iron castings at prices higher than the maximum prices for which Appellee had sold said commodities to a purchaser of the same class in March, 1942. The Appellee denied these allegations, placing this question squarely in issue. The Court, upon the evidence adduced, found in favor of the Appellee and to the effect that Tuerck-MacKenzie and others belong to the same class of purchasers as Marine Electric Company and that the sales prices to Tuerck-MacKenzie Company and others did not exceed prices charged Marine Electric Company in March, 1942. Appellant has not demonstrated to the Court that the lower Court's Findings were "clearly erroneous" or that the same are not supported by evidence. Appellee respectfully submits that there is no merit in Appellant's contention in respect to that part of the case based on the General Maximum Price Regulation.

ARGUMENT RE APPLICATION OF MPR 244

Appellant by this suit sought treble damages under Section 205-(e) of the Emergency Price Control Act of 1942 on account of castings alleged to have been sold by Appellee to certain purchasers between October 26, 1942, and March 11, 1943. The issue on this phase of the case was framed for trial in the lower Court by Paragraph VI, Plaintiff's Second

Cause of Action (R-5) as re-alleged by reference in Paragraph III of the Third Cause of Action (R-6). The allegations of this paragraph were denied by Appellee (R-9) thus putting in issue and placing upon Appellant the burden of establishing that Appellee sold castings at prices higher than fixed by MPR 244.

Appellant did not sustain the burden of proof placed upon him by the issues framed and the lower Court did not find the facts to be as alleged. The Court did find instead as set out in Finding VIII (R-22) which reads as follows:

“The court finds that on or about the 13th day of April, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Pump Company to prices above those theretofore charged said respective purchasers (16) for similar castings; that in the early part of November, 1942, defendant entered into an arrangement with the aforesaid respective purchasers to render invoices for castings delivered to them after that time upon the basis of the increased price schedule, but that notwithstanding such invoices, it was understood that such purchasers would pay only upon such invoices the amount determined by computation on the original or unrevised price schedule, or on the basis of the prices prevailing before the increase, and that the excess or difference between the amount shown by the invoice and the amount paid would be retained by such purchaser pending the determination of the validity of the increased price schedule; that since the early part of November, 1942, the defendant has continued, during the time referred to in plaintiff's complaint, to render to the aforesaid purchaser invoices and to make deliveries and receive payment in pursuance of the foregoing agreement.”

The Court further found (R-23) that all sales or deliveries to Tuerck-MacKenzie during the period referred to in Appellant's complaint (October 26, 1942, to March 10, 1943) were in pursuance of the arrangement stated in the foregoing Finding, and that invoices were rendered in accordance therewith and further that Tuerck-MacKenzie in pursuance of the agreement withheld the sum of \$1,784.06, the amount claimed by Appellant in this suit to be the excess over the maximum price.

The Court further found (R-23) the same facts as to Bingham Pump Company, except that the amount withheld is \$3,269.38. Similar findings were made in respect to Willamette Iron & Steel Corp. (R-23). The legal consequences and effects of the facts, circumstances and conditions under which the castings were delivered to Tuerck-MacKenzie, Bingham Pump Company and Willamette Iron & Steel Corporation during the period of time in question and as set out in the Finds of Fact was a proper matter for the Court to determine. The evidence was undisputed and the Findings made follow the evidence adduced.

The Findings as made do not support Appellant's allegations as to castings having been sold at prices in excess of those fixed by MPR 244. Findings recite that deliveries were made and invoices rendered at advanced prices but with the definite and unequivocal arrangement that the purchaser would pay only the prices as approved by OPA and that the excess would

be held pending the determination of Appellee's application for an increased price schedule. These facts clearly do not support an allegation that castings were sold at prices in excess of the Regulation.

Appellant by his brief makes no attempt to show that the Findings as made were contrary to the evidence or that there was no evidence to support the Finding. Instead he labors over the meaning of certain words in the Regulation and endeavors to show that the arrangement as found by the Court was in effect a sale at prohibited prices.

Sub-section (e) of Section 205, Emergency Price Control Act of 1942, at the time this suit was instituted, read as follows:

"If any person selling a commodity violates a Regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50.00 or treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater plus reasonable attorneys' fees and costs as determined by the Court. * * * If any person selling a commodity violates a Regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this Sub-section, the administrator may bring such suit or action under this Sub-section on behalf of the U. S. * * *"

The foregoing provides that the suit may be brought by the administrator only when such suit *may not be brought* by the purchaser. The purchaser

is limited to bring suit or action "either for \$50.00 or treble the amount by which the consideration exceeded the applicable maximum prices." Let us apply this provision to the state of facts in this case. Let us assume that Tuerck-MacKenzie did not buy the commodity for use or consumption in the course of trade and was eligible to bring action. What could he ask for? The law says "treble the amount by which the consideration exceeded the applicable maximum prices". Tuerck-MacKenzie paid nothing in excess of the maximum prices. Appellee received nothing from Tuerck-MacKenzie in excess of the maximum prices. Tuerck-MacKenzie, even if it fell within the category of those who might bring action under the law, would have no cause of suit against the Appellee for the very obvious reason that Appellee has received nothing from Tuerck-MacKenzie in excess of the maximum prices. Under Sub-section (e) the Administrator may bring action only when the purchasers do not fall within the proper classification. The basis for such action, however, is the same where the action is brought by the purchaser as when brought by the administrator.

Counsel for Appellant by argument appearing on pages 35-36 of his brief suggests that the "arrangement" described in the Finding defines a status falling within the scope of the words "offering", "attempting to do any of the foregoing", "over-charge", and "price means the consideration demanded" as used in the law and the Regulations.

The scope of the facts covered by the Finding precludes any such assumption or conclusion. It is apparent from the Finding that Appellee was not "offering" the castings at an excessive price because the Findings show that they were delivered and were paid for at the prices allowed by the Regulation and no further price was payable except on the approval of the OPA.

The Findings demonstrate that Appellee was not "attempting to violate the Regulations" for it shows that Appellee was not going to accept any additional amount except with the approval of OPA.

The Findings show that there was no "overcharge" because it shows the commodities were sold at the prices permitted by the Regulations and that any further amount would be payable only with the approval of OPA.

The Findings shows that Appellee was not "demanding" a consideration in excess of the maximum prices because it shows the commodities were sold at the prices permitted and no additional amount would be payable except with the approval of OPA.

According to the Finding, the *sales price* was within the Regulation. The amount that was withheld pending a decision by OPA did not make up the *sales price*. *It would become a part of the sales price only if and when such additional amount was approved by the OPA.*

Appellant does not suggest any Regulation or Court decision that by the most liberal interpretation holds that selling an article for a price within OPA regulations amounts to selling it for a price in excess of OPA regulations *because an invoice is rendered at the time of sale for a higher price with the definite understanding with the purchaser that no additional amount will be expected unless the OPA approves the increased prices.*

What amounts to a "sale" is a justicable question, therefore, when a Court finds that a sale is completed at one price with an increased amount payable *only if* the same is approved by the OPA, such Finding by the Court is conclusive on that fact.

Appellant cites the case of UNITED STATES vs. LUTZ, 142 Fed. 2d 985, as having some application to the question before the Court. That was a criminal case. The question of intent was one of primary consideration. An outright sale had been made at a price in excess of that fixed by the Regulations. The defense was based upon the contention that the price had not been paid although it was a cash sale. The only thing left undone was collecting the price that had been fixed as the purchase price for the sale. The distinction between the facts of that case and this case is obvious. In the case at Bar the Court found as a Fact that *all deliveries after October 26, 1942, were in pursuance of an unequivocal agreement that only the approved prices would be paid and nothing further*

would be paid except upon the approval of the OPA.

We respectfully submit that Appellant has failed completely to establish that the Lower Court's Findings were "clearly erroneous," therefore, Appellant's contention based on the application of MPR 244 to the facts in this case is without merit.

We have not directly addressed ourselves to some of the other matters discussed by Appellant for the reason that it seems to us the only question before the Court is whether or not the Findings of the Lower Court are "clearly erroneous". For instance, Appellant devotes some space to the "good faith" which the Court covered in Finding XV. This Finding was based upon not only the testimony of witnesses but doubtlessly on the Court's appraisalment of the witnesses while on the witness stand. Nothing said by counsel warrants the conclusion that the Court's Findings were "clearly erroneous". We therefore do not believe that there is any reason to take up seriatim the various contentions made by Appellant since they are all comprehended within the one question: Are the Findings "clearly erroneous"?

CONCLUSION

1. Appellant tried this case in the Lower Court on the theory that whether or not purchasers were of the same class was a question of fact for determination by the Trial Court. Therefore, Appellant may not take a different position in this court in respect to

that matter and all claims of Appellant in this case based upon GMPR are without merit.

2. Under GMPR the question of whether or not purchasers are of the same class is a question of fact and Findings of a Trial Court made in respect thereto will not be set aside or disturbed unless it is demonstrated that they are clearly erroneous.

3. What amounts to a sale at a price in excess of MPR 244 is a question of fact to be determined by a Trial Court. The Trial Court having determined that question as one of fact, the same will not be disturbed on appeal unless the Appellant demonstrates that the Finding is clearly erroneous.

Appellee respectfully submits that the decision of the Lower Court in this case should be affirmed.

Respectfully submitted,

BARRETT D. RANDALL

and WILBER HENDERSON,

Attorneys for Appellee,

Porter Building,

Portland, Oregon.

No. 11026

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
HOMER G. JOHNSON,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUL 11 1945

PAUL P. O'BRIEN,
CLERK

No. 11026

United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Portland, Oregon,
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In the District Court of the United States
for the District of Oregon

Civil Action No. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT AND PETITION

Plaintiff complains and alleges:

I.

That Plaintiff is a resident and inhabitant of Portland, Multnomah County, Oregon, in the above entitled district.

II.

That on or about the 28th day of April, 1937, acting through the Bureau of Public Roads, United States Department of Agriculture, issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California. That as a part of said invitation, the Defendant submitted to prospective bidders plans and specifications prepared by the Defendant upon which bids were required to be based.

III.

That the proposed project covered a distance of approximately sixteen and one-half miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate and conveniently located source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, which fact was well known to the Defendant. [1*]

IV.

That as a part of the special provisions of the specification, submitted by the Defendant, to prospective bidders, the Defendant included the following provisions:

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 mile right of Station 870 and rock for crushing is available approximately 0.3 mile right of station 1239. Unless other specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer.”

V.

That Plaintiff obtained from the Defendant a copy of said invitation or call for bids, together with a copy of the plans and specifications, and examined the site of the project, and based upon the

*Page numbering appearing at foot of page of original certified Transcript of Record.

representation of the Defendant as hereinbefore set forth relative to the availability of rock for crushing, Plaintiff prepared and submitted a bid or proposal to the Defendant, which said bid was accepted by the Defendant, and on or about the 27th day of May, 1937, Plaintiff and Defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

VI.

That immediately upon notice to proceed with the work provided for by the said contract, Plaintiff moved in on the job and drilled the quarry preparatory to shooting, and during said drilling operations due to the great quantities of soft rock encountered, Plaintiff became apprehensive of the quality of the rock in the said quarry and requested encountered was satisfactory for Defendant's purchase the resident engineer of the Defendant to examine the quarry to determine whether or not the rock poses; that the said resident engineer made an investigation and he in turn notified the district engineer's office of the questionable character of the rock encountered, and that office asked the material engineer to make a further inspection, after which inspection, Plaintiff [2] was ordered to proceed and use the said quarry.

VII.

That Plaintiff thereupon proceeded to open up the quarry by stripping and blasting, and completed the plant setup adequate to produce the crushed rock which could be conveniently used

from that setup, and after crushing about six to eight thousand tons of surfacing material, which came mostly from the outside exposure of the quarry, the engineer and inspectors of the Defendant complained about the quality of the rock which said quarry was producing, and stopped the production of further material until the district engineer's office made a further inspection and determination, which was done, and Plaintiff was again instructed to proceed and use the said quarry for the production of material; that Plaintiff proceeded to strip and blast sufficient additional rock for his estimated requirements and to crush the rock and attempted to deliver it to the project, but the material was repeatedly rejected by the inspectors of the Defendant, and the resident engineer then confined the excavation to a few small pockets within the quarry, which pockets were soon exhausted, and the quarry was then rejected as totally unsatisfactory.

VIII.

That a large quantity of the material required by the specifications consisted of rock suitable for oil processing, which character of rock, due to the fracture requirements, is more economically produced from quarried rock than from gravel, and in submitting his proposal and bid, Plaintiff had determined to produce said oil rock from the quarry hereinbefore described, but Defendant refused to permit the use of any of the quarried material for use as oil rock, and Plaintiff was forced to produce the same by crushing gravel and to haul the same

from near one end of the project over the entire project. [3]

IX.

That after the quarry designated and made available by the Defendant was finally condemned by Defendant, Plaintiff, after considerable delay and prospecting, finally located rock approximately fifteen hundred feet from the original setup, from which sufficient material was produced other than the oil rock to finish the deliveries of materials from that setup, so that not too great a loss would be involved in overhaul from the gravel quarry.

X.

That the repeated rejections of materials hereinbefore described and the extra time spent in locating, shooting, and opening a new quarry, and the additional time required in hauling material from the gravel pit, and in producing the oil rock from the gravel pit delayed the Plaintiff in the performance of his contract, and had such delays not been encountered, said work would have been completed by October 15, 1937, but due to the said delays, the Plaintiff's contract could not be completed before the winter of 1937, and work was necessarily shut down during the said winter, and Plaintiff was required to return to the job in the spring and summer of 1938, and complete the same.

XI.

That although the delay in the performance of the said contract was directly attributable to the

breach of contract by the Defendant in failing to furnish an adequate quarry as set out in the specifications, nevertheless Defendant assessed against Plaintiff a penalty for delay in completion in the sum of \$1575.00 and deducted said amount from the amount earned by Plaintiff under his contract.

XII.

That due to the failure of the quarry as hereinbefore described, Plaintiff was compelled to open a substitute quarry and in so doing incurred an extra cost in opening and operating the said sub- [4] stitute quarry in the sum of \$2490.40, and in addition thereto, incurred an extra cost of overhead and superintendence in the sum of \$660.10.

XIII.

That due to the said breach of contract of Defendant, Plaintiff incurred an extra cost of the hauling of oil rock and oil maintenance rock of \$956.48.

XIV.

That in producing oil rock from the gravel pit from which Defendant wrongfully required its production, as hereinbefore alleged, Plaintiff incurred an extra and additional expense of \$1467.84.

XV.

That due to the delay in completion directly attributable to the failure of the rock quarry, as hereinbefore described, Plaintiff was required to return in the year 1938 and complete his contract and was directed and required by the Defendant to

reprocess and reshape work theretofore done during the year 1937, and in so doing incurred an extra and additional expense of \$2850.17, which would not have been required except for the said breach of contract by the Defendant.

XVI.

That Plaintiff finally completed reshaping and resurfacing the said highway, and his contract was accepted as complete by the Defendant in the month of August, 1938, and final payment of the amount determined to be due Plaintiff by the Government was made to him in the month of January, 1939, and on January 18, 1939, Plaintiff presented to the Defendant, through its District Engineer, B. H. Sweetzer, of the United States Department of Agriculture, Bureau of Public Roads, at San Francisco, California, his claim and demands for damages hereinbefore set forth, but Defendant has refused to pay the same or any part thereof. [5]

Wherefore, Plaintiff prays for a judgment against the Defendant in the sum of Nine Thousand Nine Hundred Ninety-Nine and 99/100 Dollars (\$9,999.99), and for his costs and disbursements.

(signed) JOHN LICHTY

Attorney for Plaintiff

United States of America,
District of Oregon—ss.

I, Homer G. Johnson, being first duly sworn, depose and say:

That I am the Plaintiff in the within entitled suit and that the foregoing Complaint is true as I verily believe.

(signed) HOMER G. JOHNSON

Plaintiff

Subscribed and sworn to before me this 2nd day of December, 1942.

[Seal] (signed) JOHN LICHTY

Notary Public for the State of Oregon. My commission expires: October 27, 1946

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 7th day of December, 1942.

CARL C. DONAUGH

U. S. Attorney for Oregon

[Endorsed]: Filed December 7, 1942. [6]

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America and for its answer to plaintiff's complaint denies as follows:

I.

Denies paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, of plaintiff's complaint and the whole of each paragraph thereof.

Wherefore, defendant prays that plaintiff take nothing by his complaint, and that the defendant have its costs and disbursements.

CARL C. DONAUGH

United States Attorney

By WILLIAM M. LANGLEY

Assistant United States

Attorney

I, John Lichty, attorney of record for the within plaintiff do hereby acknowledge service of this answer to plaintiff's complaint by receiving a true copy of said answer in the City of Portland, Oregon, within the District of Oregon, this 27th day of January, 1943.

/s/ JOHN LICHTY, by A.J.E.

Attorney for plaintiff

[Endorsed]: Filed January 27, 1943. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains and alleges:

I.

That Plaintiff is a resident and inhabitant of Portland, Multnomah County, Oregon, in the above entitled district.

II.

That on or about the 28th day of April, 1937, acting through the Bureau of Public Roads, United

States Department of Agriculture, issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California. That as a part of said invitation, the Defendant submitted to prospective bidders plans and specifications prepared by the Defendant upon which bids were required to be based.

III.

That the proposed project covered a distance of approximately sixteen and one-half miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate and conveniently located source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, which fact was well known to the Defendant.

[8]

IV.

That as a part of the special provisions of the specification, submitted by the Defendant, to prospective bidders, the Defendant included the following provisions:

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 mile right of Station 870 and rock for crushing is available approximately 0.3 mile right of Station 1239. Unless other specifically approved in writing by

the Engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

V.

That Plaintiff obtained from the Defendant a copy of said invitation or call for bids, together with a copy of the plans and specifications, and examined the site of the project, and based upon the representation of the Defendant as hereinbefore set forth relative to the availability of rock for crushing, Plaintiff prepared and submitted a bid or proposal to the Defendant, which said bid was accepted by the Defendant, and on or about the 27th day of May, 1937, Plaintiff and Defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

VI.

That immediately upon notice to proceed with the work provided for by the said contract, Plaintiff moved in on the job and drilled the quarry preparatory to shooting, and during said drilling operations due to the great quantities of soft rock encountered, Plaintiff became apprehensive of the quality of the rock in the said quarry and requested the resident engineer of the Defendant to examine the quarry to determine whether or not the rock encountered was satisfactory for Defendant's purposes; that the said resident engineer made an in-

vestigation and he in turn notified the district engineer's office of the questionable [9] character of the rock encountered, and that office asked the material engineer to make a further inspection, after which inspection, Plaintiff was ordered to proceed and use the said quarry.

VII.

That Plaintiff thereupon proceeded to open up the quarry by stripping and blasting, and completed the plant setup adequate to produce the crushed rock which could be conveniently used from that setup, and after crushing about six to eight thousand tons of surfacing material, which came mostly from the outside exposure of the quarry, the engineer and inspectors of the Defendant complained about the quality of the rock which said quarry was producing, and stopped the production of further material until the district engineer's office made a further inspection and determination, which was done, and Plaintiff was again instructed to proceed and use the said quarry for the production of material; that Plaintiff proceeded to strip and blast sufficient additional rock for his estimated requirements and to crush the rock and attempted to deliver it to the project, but the material was repeatedly rejected by the inspectors of the defendant, and the resident engineer then confined the excavation to a few small pockets within the quarry, which pockets were soon exhausted, and the quarry was then rejected as totally unsatisfactory.

VIII.

That a large quantity of the material required by the specifications consisted of rock suitable for oil processing, which character of rock, due to the fracture requirements, is more economically produced from quarried rock than from gravel, and in submitting his proposal and bid, Plaintiff had determined to produce said oil rock from the quarry hereinbefore described, but defendant refused to permit the use of any of the quarried material for use as oil rock, and Plaintiff was forced to produce [10] the same by crushing gravel and to haul the same from near one end of the project over the entire project.

IX.

That after the quarry designated and made available by the Defendant was finally condemned by Defendant, Plaintiff, after considerable delay and prospecting, finally located rock approximately seven hundred and fifty feet from the original setup, from which sufficient material was produced other than the oil rock to finish the deliveries of materials from that setup, so that not too great a loss would be involved in overhaul from the gravel quarry.

X.

That the repeated rejections of materials hereinbefore described and the extra time spent in locating, shooting, and opening a new quarry, and the additional time required in hauling material from the gravel pit, and in producing the oil rock from the gravel pit delayed the Plaintiff in the perform-

ance of his contract, and had such delays not been encountered, said work would have been completed by October 15, 1937, but due to the said delays, the Plaintiff's contract could not be completed before the winter of 1937, and work was necessarily shut down during the said winter and Plaintiff was required to return to the job in the spring and summer of 1938, and complete the same.

XI.

That although the delay in the performance of the said contract was directly attributable to the breach of contract by the Defendant in failing to furnish an adequate quarry as set out in the specifications, nevertheless Defendant assessed against Plaintiff a penalty for delay in completion in the sum of \$1575.00 and deducted said amount from the amount earned by Plaintiff under his contract. [11]

XII.

That due to the failure of the quarry as hereinbefore described, Plaintiff was compelled to open a substitute quarry and in so doing incurred an extra cost in opening and operating the said substitute quarry in the sum of \$2490.40, and in addition thereto, incurred an extra cost of overhead and superintendence in the sum of \$660.10.

XIII.

That due to the said breach of contract of Defendant, Plaintiff incurred an extra cost of the hauling of oil rock and oil maintenance rock of \$956.48.

XIV.

That in producing oil rock from the gravel pit from which Defendant wrongfully required its production, as hereinbefore alleged, Plaintiff incurred an extra and additional expense of \$4945.92.

XV.

That due to the delay in completion directly attributable to the failure of the rock quarry, as hereinbefore described, Plaintiff was required to return in the year 1938 and complete his contract and was directed and required by the Defendant to reprocess and reshape work theretofore done during the year 1937, and in so doing incurred an extra and additional expense of \$2850.17, which would not have been required except for the said breach of contract by the Defendant.

XVI.

That due to the soft material in the rock quarry furnished by Defendant, Plaintiff's roll crushing equipment repeatedly broke down and Plaintiff was compelled to spend the sum of \$1029.63 in making repairs, which would not have been necessary had the rock in the quarry been sound, tough and durable. [12]

XVII.

That Plaintiff had available on the job and was using oiling equipment which he had rented in the year 1937 and due to the inability to finish the oiling in 1937 Plaintiff was required to return this equipment to Portland, Oregon, and again in 1938 to re-

rent the equipment and ship it to the job and return it at the close of the job. That the additional cost of freight is the sum of \$487.02.

XVIII.

That Plaintiff finally completed reshaping and resurfacing the said highway, and his contract was accepted as complete by the Defendant in the month of August, 1938, and final payment of the amount determined to be due Plaintiff by the Government was made to him in the month of January, 1939, and on January 18, 1939, Plaintiff presented to the Defendant, through its District Engineer, B. H. Sweetzer, of the United States Department of Agriculture, Bureau of Public Roads, at San Francisco, California, his claim and demands for damages hereinbefore set forth, but Defendant has refused to pay the same or any part thereof.

Wherefore, Plaintiff prays for a judgment against the Defendant in the sum of Ten Thousand (\$10,000) Dollars.

/s/ J. L. LICHTY

Attorney for Plaintiff.

Service copy received July 19, 1944.

/s/ Marie Drumeff

[Endorsed]: Filed July 20, 1944. [13]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

I.

AGREED FACTS

1.

This Court has jurisdiction within the meaning of the Tucker Act, and the plaintiff is a resident of the State of Oregon.

2.

On or about the 28th day of April, 1937, acting through the Bureau of Public Roads, the United States Department of Agriculture issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California; upon request, the defendant submitted to prospective bidders plans and specifications prepared by the defendant upon which bids were required to be based; the proposed project covered a distance of 16.16 miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway; as a part of the special provisions of the specifications submitted by the defendant to prospective bidders was the following provision:

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 miles right of Station 870, and rock for crushing is available approximately 0.3 mile right of Station 1239. Unless otherwise especially approved in writing by the engineer, only materials from [14] the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer.”

3.

Plaintiff obtained from the defendant a copy of the invitation for bids, together with a copy of the plans and specifications, and examined the site of the project. Plaintiff prepared and submitted a bid to the defendant, which was accepted by the defendant, and on or about May 27, 1937, plaintiff and defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

4.

Plaintiff received notice by telegram dated June 7, 1937, to proceed with the construction within ten days thereof, and some time thereafter moved in Plaintiff's equipment for the purpose of drilling the quarry. Plaintiff drilled coyote holes in the quarry, approximately .3 mile right of Station 1239, and during the preparation of these coyote holes soft rock was encountered and the resident engineer of the plaintiff made an investigation and he in turn notified the United States District Engineers Office

at San Francisco and the representative of the said District Engineers Office visited the quarry, examined the rock as disclosed by the holes drilled up to that time and determined that the quarry was adequate and suitable for the production of material required by the plans and specifications, and plaintiff proceeded with shooting and opening the quarry. The plaintiff proceeded to work on the quarry and set up his crushing plant and produced a portion of the crushed rock needed for the construction and the government inspectors complained that the rock being produced by the plaintiff did not meet contract grading specifications, after which the District Engineers Office made a further inspection of the quarry and again determined that the quarry was adequate to produce satisfactory material and plaintiff thereupon stripped and blasted the quarry to produce the material for the performance of his contract. That on September 4, 1937 [15] plaintiff was told by Joseph E. Wood, Resident Engineer in charge, that the rock in quarry at station 1239 was not good enough for cover material but that plaintiff could use rock 400 feet beyond plant for cover material. That on September 13, 1937, plaintiff moved to face number 2, approximately 450 to 700 feet from the original face. That plaintiff produced the cover material necessary for the job from station 870.

5.

The contract time within which plaintiff was required to complete his contract would expire on

October 20, 1937. Plaintiff did not complete his contract by October 20, 1937, and unsatisfactory weather developed shortly thereafter making it impossible for further work upon the project and on November 5, 1937, plaintiff moved out his equipment and shut down the job.

6.

On June 16, 1938, defendant gave notice to plaintiff to proceed to complete his contract and plaintiff began operations on June 20, 1938, and completed his contract on August 21, 1938. The overrun in contract time resulted in a claim being presented on January 18, 1939, to the District Engineer, who denied the claim on June 15, 1939. Plaintiff appealed the claim to the Commission of Public Roads, Washington, D. C., on May 13, 1941, and the commissioner refused to consider the ruling of the District Engineer because plaintiff had not appealed within thirty days as provided by Article 15 of the contract.

7.

This case is to be tried in two parts, the first part liability and the second part the amount of damage.

II.

CONTENTIONS OF THE PARTIES

1.

Contentions of Plaintiff

(a) That upon receipt by the plaintiff of the notice to proceed with construction, Plaintiff, to-

gether with the Superintendent, [16] drove to the operation site and conferred with the representative of the defendant and immediately thereafter moved in plaintiff's equipment for the purpose of drilling the quarry.

(b) That the engineer of the defendant was present and designated the point at which the quarry should be drilled and opened.

(c) That preparatory to opening and operating the quarry plaintiff drilled coyote holes which was the customary and usual manner of opening and preparing a quarry of this character and in conformity to good contracting practice.

(d) That upon drilling the coyote holes soft rock was encountered and plaintiff became apprehensive of the quality and suitability of the rock in the quarry and requested the resident engineer of the defendant to examine the quarry to determine whether or not the quarry was satisfactory for defendant's purpose.

(e) That defendant through its engineers and representatives refused to permit plaintiff to use any of the material produced from the said quarry for oil rock (cover material), stating that there was too much soft rock in the aggregate produced by plaintiff, and plaintiff after some prospecting located a source of rock approximately 750 feet from the quarry which he had first opened up and plaintiff stripped and opened that quarry and began to produce aggregate from said source, but again defendant's engineers refused to permit him to use the aggregate from such new source for the use of

making oil rock and plaintiff was required to produce all of the oil rock used at the gravel pit located at or near Station 870; that the character of the material in both the first and second locations near station 1239 was too soft for the operation of the crushing equipment ordinarily and customarily used in a rock quarry and hampered the rate of production of crushed rock and caused repeated breakdowns of the crushing equipment.

(f) Plaintiff had shaped and cleaned the gutters constructed during the year 1937 before shutting down that year and during the winter when operations were shut down slides and raveling caused the [17] gutters to become partly filled up and the resident engineer required plaintiff to clean them in his operations in the year 1938. In addition to cleaning the gutters plaintiff was required to reprocess and reshape work which had been completed and accepted during the year 1937 which would not have been required had the contract been completed before the winter of 1937.

(g) That the failure of the quarry designated by Section -2.2 of the contract to produce satisfactory material was inherent in the nature of the material in the quarry, and that Section -2.2 of the contract was a warranty that satisfactory material could be produced therefrom, and that the quarry located at or near Station 1239 would produce satisfactory material for all of the work required under the contract.

(h) That plaintiff is entitled to damages as a re-

sult of such breach, and defendant is liable to plaintiff therefor.

(i) That defendant broke its contract with plaintiff, and that the breach resulted in plaintiff failing to complete the contract on time, and that the act of the defendant in assessing damages for failure to complete on time was a breach of contract by the defendant.

(j) That the additional cost of shaping work done during the year 1937 and the cleaning of the gutters, due to slides occurring during the winter of 1937, and the cost thereof, is directly attributable to the breach of contract by the defendant, and plaintiff is entitled to damages measured by the additional cost of doing such work.

2.

Contentions of Defendants

(a) The case should be postponed pending the return to the Continental United States of Joseph E. Wood, resident engineer of the said project;

(b) Failure of plaintiff to appear to the Commissioner of Public Roads from the ruling of the District Engineer within the time specified in Article 15 of the contract is a bar to this action; [18]

(c) That no preliminary work was started at the quarry until June 29 and no crushed rock was produced and placed on the road until August 9, due to Plaintiff's negligence and delay in getting men to work, failure to press with all possible speed the opening and the development of the quarry and delay in the arrival and complete installation of his

crushing plant including crushers, power units, rollers, conveyors, weighing scales, etc.

(d) That the engineer of the defendant did not designate the point at which the quarry should be drilled and opened.

(e) That it was not necessary for the plaintiff to drill coyote holes and defendant had no control and did not attempt to assert control over the method of producing the rock. Plaintiff selected this method for his own convenience.

(f) That the resident engineer requested an inspection by the district materials engineer because stratas of soft rock were found in the deeper portions of the quarry during the coyote tunneling operation. The materials engineer found that these soft stratas did not contain detrimental material but because the soft rock would break down in crushing it would produce an excess of fine material in the crusher product unless some segregation was made in the soft rock. He advised the plaintiff's superintendent that his proposed method of coyote hole shooting would admix the soft and hard rock and make the segregation difficult and *advised* that loading of the material be done with a power shovel in order that segregation would be made. The materials engineer did not direct the plaintiff to proceed with shooting and opening the quarry.

(g) Plaintiff opened a second face of the quarry adjacent to Station 1239 on or about September 11, 1937, after obtaining approximately 15000 tons of crusher run top course from the first face and after his methods of operation had so admixed soft and

hard rock at this face as to make segregation difficult. Rock for the production of crusher run top course was thereafter obtained from both faces until September 18. [19] On September 18 the shaft of the roll crusher broke and plaintiff elected to move his crushing plant to the source adjacent to Station 870 and obtain the balance of the crusher run top course and all of the cover aggregate from that source. This move was not made because of rock shortage in the quarry at Station 1239 as ample rock was available there. It was made because the plaintiff had obtained approximately all of the crusher run top course he desired from that source and he elected to conserve time by moving while the plant was broken down pending arrival of replacement parts.

(h) It is the government's contention that no crushed material was ever rejected because of quality, or that plaintiff was ever barred from using the quarry material. Material was rejected only because the crushed product did not meet requirements for grading as it contained an excess of fine particles. This difficulty could have been avoided by proper segregation of materials in the pit. The quality of rock at Station 1239 was not the cause of rejection, but method of operation caused failure to meet contract grading requirements. No prohibition was made against the material being obtained from the first face until plaintiff had produced 15,000 tons of crusher run top course, and by his method of operation had then so admixed the softer and harder rock as to make segregation of

these impracticable. Plaintiff was then told by Joseph E. Wood, Resident Engineer, on September 4, 1937, that it would be impracticable for him to produce satisfactory cover material from the first face. No prohibition ever was made against cover material being obtained from the second face and plaintiff could have obtained the material from this face at any time had he so desired. Plaintiff moved his crushing plant from the quarry at Station 1239 before producing the cover aggregate and produced the cover material from the source at Station 870 for his own convenience in order to conserve time. Defendant made no requirement that the cover material should be produced from the source at Station 870.

(i) Defendant did not warrant quantity or quality of rock at sites designated in the contract; on the contrary, plaintiff assumed the risks concerning the quantity and quality of rock at the designated sites, and the responsibility of producing a properly graded crushed product therefrom. [20]

(j) Plaintiff received all rock from sources designated in the contract; the so-called new quarry was not a change of site, but "Within approximately 0.3 mile right of Station 1239," as provided in Section -2.2 of contract;

(k) Assuming that the court finds that the so-called new quarry is a change of site and not within the contract provision "approximately 0.3 mile right of Station 1239," plaintiff cannot claim breach of contract, since he did not exhaust the other

sources specified in the contract before beginning operations at the third site;

(1) Plaintiff's inability to complete the contract on time resulted from his failure to recognize time as the essence of his contract and his delay in developing the quarry at Station 1239 and in completing his crushing plant assembly and installation. He permitted fifty percent of the contract time to elapse before he produced and placed any crushed rock on the road.

(m) That the defendant does not know whether the plaintiff did or did not shape and clean the gutters in the fall of 1937, but if he did that was not a satisfaction of the contract requirements, since the contract required the gutters to be shaped and cleaned at the completion of the project, and no section of the project was completed and accepted during 1937; and defendant contends that plaintiff was not required to reprocess and reshape work which had been completed and accepted during the year 1937 or to do any work not required by the contract.

III.

QUESTIONS TO BE DETERMINED

It is agreed that the contract time was over-run and that this was the cause of some of the damage plaintiff suffered. The problem is what caused the over-run and who is legally responsible for it.

The second problem is whether or not the quarry approximately 0.3 mile right of Station 1239 was a suitable quarry for producing the material re-

quired for the performance of the contract, and whether or not it was [21] so warranted by the defendant. The questions to be determined are:

1. Did plaintiff begin productive operations within a reasonable time after receiving notice to begin operations? And if not, was the neglect to do so a material factor in causing the contract to overrun?

2. Did defendant's agents direct the plaintiff in the method of operation such as which source to begin operations, the particular spot in the source to begin, the drilling of coyote holes and the type of equipment used?

3. Did plaintiff attempt to produce cover material from either face 1 or 2 at Station 1239?

4. If he did, was it rejected by the defendant?

5. Assuming that it was rejected, was the rejection the result of the plaintiff's method of operation or was the rock inherently defective?

6. If the rock is determined to be inherently defective, did the defendant warrant by section -2.2 of the contract the quality and quantity of the rock at the designated sources?

7. If the defendant did so warrant, can the plaintiff avail himself of the warranty without first exhausting both of the designated sources?

8. If so, was the 2nd site a source not designated in Section -2.2 of the contract or was it within .3 mile right of Station 1239?

9. Is Joseph E. Wood, Resident Engineer of the said project, an indispensable witness?

10. Is plaintiff barred from this action because he did not strictly follow Article 15 of the contract?

(a) Does Article 15 apply to both questions of law and questions of fact? [22]

(b) If Article 15 applies only to questions of fact, is plaintiff's case the claim that defendant's agents acted erroneously on a question of fact?

IV.

EXHIBITS

At said pre-trial conference the following pre-trial exhibits were offered and marked by the reporter, and in each instance both parties agreed that said exhibits were admissible in evidence.

Plaintiff's Pre-Trial Exhibits

No. 1. Photograph of original quarry.

No. 2. Photograph of original quarry.

No. 3. Photograph of original quarry.

No. 4. Photograph of original quarry.

Defendant's Pre-Trial Exhibits

No. 5. Photostatic copy of Bid, Contract, and Bond for Forest Road Construction, this photostatic copy being under the seal of Philip B. Fleming, Federal Works **Administrator**.

No. 5a. General Specifications FR50-1035 for Forest and Park Road Construction.

No. 6. Photostatic copy of letter dated June 7, 1937, addressed to Homer G. Johnson, signed by N. L. Wilson, Acting Secretary, Department of Agriculture, notification of acceptance of proposal.

No. 7. Telegram dated June 7, 1937, addressed to Homer G. Johnson, notice to start operations within ten days.

No. 8. Letter dated June 30, 1937 signed by Homer G. Johnson, acknowledging receipt of instructions to proceed with this project.

No. 9. Letter dated July 14, 1938, addressed to Homer G. Johnson, signed C. N. Sweetser, being Change Order No. 1.

No. 10. Letter dated October 1, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, temporary suspension of construction.

No. 11. Letter dated October 4, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction. [23]

No. 12. Letter dated October 15, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend construction.

No. 13. Letter dated October 16, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction.

No. 14. Letter dated November 5, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend all construction.

No. 15. Letter dated June 13, 1938, addressed to Homer G. Johnson, signed by Joseph E. Wood.

No. 16. Letter dated June 20, 1941, addressed to Homer G. Johnson, signed by C. D. Curtice, Acting Commissioner of Public Roads, refusing consideration of Johnson's claim.

No. 17. Letter dated May 13, 1941, addressed to Public Roads Administration, signed by Homer G.

Johnson, asking consideration of his claim previously presented to District Engineer's Office, San Francisco, California.

No. 18. Letter dated June 15, 1939, addressed to Homer G. Johnson, signed by C. N. Sweetser, District Engineer, denying claim submitted by Johnson, consisting of six pages.

No. 19. Letter dated January 18, 1939, addressed to C. N. Sweetser, District Engineer, signed by Homer G. Johnson, presenting claim of Johnson, consisting of twenty-four pages.

No. 20. The original diary kept by Joseph E. Wood of daily events concerning the involved project.

No. 21. Original Daily Report for Crushed Rock Surfacing, kept by Joseph E. Wood, of the involved project.

No. 22. Plan and Equipment Questionnaire, executed by Homer G. Johnson, concerning the involved project.

No. 23. Vicinity map of quarry site with photographs attached.

No. 24. Photograph view of easterly edge of face No. 1 of Johnson Quarry. [24]

No. 25. Photograph view of old quarry near highway containing rock similar to that in Johnson Quarry.

No. 26. Photograph view of face No. 1 of Johnson Quarry before shooting by Johnson.

No. 27. Photograph view during operations at face No. 2 of Johnson Quarry.

No. 28. Photograph view of plant in operation at face No. 1 of Johnson Quarry.

The court finding that the foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings and does hereby order that said pre-trial order be, and it is hereby, incorporated into and made a part of the record of this case for the purpose of controlling the course of proceedings on the formal trial hereof.

Dated at Portland, Oregon, this 11th day of April, 1944.

CLAUDE McCOLLOCH

District Judge

/s/ J. L. LICHTY

of Attorneys for Plaintiff

/s/ WILLIAM M. LANGLEY

of Attorney for Defendant

[Endorsed]: Filed April 11, 1944. [25]

[Title of District Court and Cause.]

MEMO OF DECISION

In the view I take, there was no dispute as to a question of fact, requiring submission to the contracting officer and appeal to the head of the Department. Rather, the dispute is over interpretation

of the contract,¹ and the effect on the obligations under the contract of the disclosure that the quarry did not contain good rock.

The case may proceed to trial of the damages. I recognize that there may be some difficulty in determining what portion of the contractor's damages are properly chargeable to the quarry.

Dated April 21, 1944.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed April 21, 1944. [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action coming on regularly for trial before the court without a jury, and the court having first tried the issue as to the question of breach of contract and liability and having thereupon entered an interlocutory findings of fact, and thereafter having heard the evidence adduced by the parties relative to damages sustained by plaintiff and both parties having rested,

Now, Therefore it does hereby make and enter the following findings of fact and conclusions of law:

¹ I will amplify this in the Findings.

FINDINGS OF FACT

I

This court has jurisdiction within the meaning of the Tucker Act, and the plaintiff is a resident of the State of Oregon.

II

On or about the 28th day of April, 1937, acting through the Bureau of Public Roads, the United States Department of Agriculture issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 55, Mt. Shasta-Mt. Lassen National Forest Highway [27] Shasta National Forest, Siskiyou and Shasta Counties, California; upon request, the defendant submitted to prospective bidders, plans and specifications prepared by the defendant upon which bids were required to be based; the proposed project covered a distance of 16.16 miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, as a part of the special provisions of the specifications submitted by the defendant to prospective bidders was the following provisions

“-2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 miles right of Station 870., and rock for crushing is available

approximately 0.3 miles right of Station 1239. Unless otherwise especially approved in writing by the engineer, only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

III

Plaintiff obtained from the defendant a copy of the invitation for bids, together with a copy of the plans and specifications, and examined the site of the project. Plaintiff prepared and submitted a bid to the defendant, which was accepted by the defendant, and on or about May 27, 1937, plaintiff and defendant entered into a contract pursuant thereto for the performance of the work hereinbefore described.

IV

Plaintiff received notice by telegram, dated June 7, 1937, to proceed with the construction within ten days thereof, and some time thereafter moved in plaintiff's equipment for the purpose of drilling the quarry. Plaintiff drilled coyote holes in the quarry, approximately 0.3 miles right of Station 1239, and during the preparation of these coyote holes soft rock was encountered and the resident engineer of the defendant made an [28] investigation and he in turn notified the United States District Engineers office at San Francisco and the representative of the said District Engineers Office visited the quarry, examined the rock as disclosed by

the holes drilled up to that time and determined that the quarry was adequate and suitable for the production of material required by the plans and specifications, and plaintiff proceeded with shooting and opening the quarry. The plaintiff proceeded to work on the quarry and set up his crushing plant and produced a portion of the crushed rock needed for the construction and the government inspectors complained that the rock being produced by the plaintiff did not meet contract grading specifications, after which the District Engineers Office made a further inspection of the quarry and again determined that the quarry was adequate to produce satisfactory material and plaintiff thereupon stripped and blasted the quarry to produce the material for the performance of his contract. That on September 4, 1937, plaintiff was told by Joseph E. Wood, Resident Engineer in charge, that the rock in quarry at Station 1239 was not good enough for cover material, and plaintiff thereafter prospected for a new quarry in that vicinity and uncovered a new quarry approximately 450 feet from the old quarry and drilled and blasted that rock and loaded and hauled rock from the new quarry to the crusher in the old quarry, and produced some additional base cover material from this source, but after approximately ten days operation the soft rock from the new quarry began interfering with production and due to the excess soft rock a shaft roll in the crusher broke on the 18th day of September, 1937, and the contractor ceased operating at both of the quarries near Station 1239

and moved his crushing plant and equipment to the gravel pit at or near Station 870.

V

That thereafter plaintiff produced and spread upon the highway all of the surfacing material necessary to complete [29] the roadway, but unsatisfactory weather developed shortly thereafter making it impossible to complete the armor surface for the roadway, consisting of a mixture of oil and rock chips, and the defendant notified the plaintiff to shut down the job until notified to proceed to complete it in the next year when the weather would permit its completion.

VI

That due to the unsatisfactory material in the quarry designated by the government, approximately 0.3 of a mile right of Station 1239, it was impossible for the plaintiff to produce the rock chips necessary for the armor surface cover material from that quarry, and had there been available, in the said quarry, satisfactory material plaintiff could have produced, while crushing and spreading surface course material, enough rock chips and have had the same stock piled and available for application to the armour surface course to have enabled him to have completed the southerly half of the job from the one crusher set-up.

VII

That the specifications provided that crusher run surface course material should be crushed from

sound, tough, durable rock and should be uniform in quantity and grading, and the rock present in the quarry designated by the defendant, approximately 0.3 of a mile right of Station 1239 was neither sound, tough nor durable and plaintiff was repeatedly compelled to waste truck loads of material produced from the said quarry as not being up to specifications, and in attempting to meet specifications plaintiff was compelled to use unusual and expensive methods, and the presence of large quantities of soft rock in the quarry caused repeated breakdowns and damage to plaintiffs' equipment for which plaintiff has not been compensated.

VIII

That the failure of the government to furnish to plaintiff adequate and satisfactory quarries at the place designated in the call for bids and specifications resulted in delaying the completion of the project and made it impossible for the plaintiff to complete the project within the time limit provided in the contract and prior to the winter of 1937, and defendant assessed against plaintiff a penalty of liquidated damages in the sum of \$1,575.00.

IX

That due to the fact that plaintiff could not produce satisfactory crusher run material from the said quarry he was unable to complete the surface course material for the full southerly half of the job from the said quarry, and which required him to haul a considerable portion of the surface course mate-

rial from the gravel pit approximately .5 of a mile right of Station 870 to complete the work that he should have been able to have completed from the rock quarry set-up, causing him extra cost due to the longer haul in the amount of \$956.48.

X

That had the rock in the quarry, approximately .3 of a mile right of station 1239, been sound, tough and durable the rock chips necessary for the completion of the southerly half of the job could have been segregated from the crusher rock material and stock piled, but due to the fact that the Government Engineers refused to permit plaintiff to use any of the rock from the said quarry for rock chips or oil rock, plaintiff was compelled later to run gravel through the crusher at the gravel pit for the production of the oil chips necessary to complete the southerly half of the job, which operation would have been unnecessary had the rock quarry been as represented and warranted by the government in the specifications and call for bids. The plaintiff in his operations necessarily expended \$4618.34 in producing the rock chips or oil rock which he would not have been required to [31] spend had the rock quarry been adequate.

XI

That plaintiff had completed and shaped the roadway and gutters as the gravel and rock material was spread during the year 1937, but due to the fact he could not complete the same prior to the

bad weather in the winter of 1937, plaintiff was compelled to reprocess and reshape the same at extra and additional expense after he was permitted to resume operations in 1938, and he has not been compensated for any part of such additional expense. That the plaintiff necessarily expended the sum of \$2,850.17 in such operations.

XII

That had the rock in the said quarry, approximately .3 of a mile right of Station 1239, been sound, tough and durable rock and of the quality contemplated by the defendant and plaintiff at the time the contract was entered into, plaintiff with his equipment and crew and plan of operation would have been able to have completed his said contract within the time limited and prior to the unseasonable weather in the fall and winter of 1937.

And from the foregoing findings of fact the court does hereby make and enter the following conclusions of law.

CONCLUSIONS OF LAW

That plaintiff is entitled to judgment against the defendant for the sum of \$9,999.99.

Done In Open Court this 17th Day of Nov., 1944.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed November 17, 1944. [32]

[Title of District Court and Cause.]

MOTION

Comes Now William M. Langley, Assistant United States Attorney for the District of Oregon, and moves this Court for an order amending the Findings of Fact now on file in the within case, and in support of this motion states to this Court that on April 11, 1944, in accordance with the Rules of Civil Procedure for the District Courts of the United States and in accordance with the practice of this Court, a Pre-trial Order was signed by the attorneys appearing in this case and by Claude Mc-Colloch, Judge of the United States District Court for the District of Oregon; that on Page 9 of the Pre-trial Order there are certain questions stated and are the questions agreed by the attorneys and the Court to be determined in this case; that the Findings of Fact now on file in this case do not answer the said questions, and it is the request of the United States of America that these questions either be answered or the Findings of Fact amended so that the questions are answered;

That the United States of America further moves this Court that the Findings of Fact be amended and answer the questions set out on Page 9 of the Pre-trial Order as follows:

Answer the first part of Question 1 in the negative;

Answer the second part of Question 1 in the affirmative;

Answer Question 2 in the Negative;

Answer Question 3 in the negative;

Answer Question 4 in the negative; [33]

Answer Question 5 that assuming that material was rejected that rejection was the result of plaintiff's method of operation;

Answer Question 6 by stating that the answer to Question 5 answers Question 6, but if the Court answers Question 5 that the rock was inherently defective then Question 6 should be answered in the negative;

Answer Question 7 by saying that the answer to Question 6 answers Question 7, but if the Court answers Question 6 by stating that defendant is warranted by Section -212 of the contract the answer to Question 7 should be in the negative;

Answer Question 8 by stating that the second site was within three-tenths of a mile right of Station 1239;

Answer Question 9 by stating that Joseph E. Wood is an indispensable witness;

Answer Question 10 by stating that the case of United States v. Algernon Blair, etc., decided by the United States Supreme Court on April 10, 1944, bars plaintiff from this action.

Dated at Portland, Oregon, this 13th day of November, 1944.

/s/ WILLIAM M. LANGLEY

Assistant United States

Attorney

State of Oregon,

County of Multnomah—ss.

I, William M. Langley, Assistant United States Attorney for the District of Oregon, being first duly sworn, depose and say that I have served the attached motion upon John Lichty, attorney for the within defendant, Homer G. Johnson, by depositing in the United States mail a true and correct copy of this motion in an envelope addressed to John Lichty, Attorney at Law, Failing Building, Portland, Oregon, with postage prepaid.

/s/ WILLIAM M. LANGLEY

Subscribed and sworn to before me this 13th day of November, 1944.

[Seal] /s/ FRANK L. MEYER

Notary Public for Oregon. My commission expires
May 24, 1948.

[Endorsed]: Filed November 20, 1944. [34]

[Title of District Court and Cause.]

ORDER

The motion of the United States of America dated November 13, 1944, coming on for hearing, and the Court being fully advised in the premises, It Is Hereby Ordered that said motion be denied.

Dated at Portland, Oregon, this 5th day of
December, 1944.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed December 5, 1944. [35]

In the District Court of the United States
for the District of Oregon

No. Civ. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above entitled action having been tried by
the Court without a jury and the court having
heretofore made and entered findings of fact and
conclusions of law, and deeming itself fully advised
in the premises,

Now, Therefore It Is Hereby Ordered, Adjudged
and Decreed that the plaintiff have and recover of
and from the defendant the sum of \$9,999.99.

Done in Open Court This 20th day of November
1944.

/s/ CLAUDE McCULLOCH

Judge

[Endorsed]: Filed November 20, 1944. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Homer G. Johnson, plaintiff above named,
and John Lichty, his attorney:

You, and each of you, will please take notice
that the defendant, United States of America,
appeals from that certain judgment in the above-
entitled cause made and entered the 20th day of
November, 1944, by the Honorable Claude McCol-
loch, Judge of the above-entitled court, wherein the
plaintiff recovered judgment against the defendant
in the sum of \$9,999.99.

CARL C. DONAUGH

United States Attorney for the District of Oregon

By J. MASON DILLARD

Asst. United States Attorney

Of Attorneys for Defendant

United States of America

District of Oregon—ss.

Due and legal service of the within Notice of
Appeal is accepted in the State and District of
Oregon this 17 day of February, 1945, by receiving
a copy thereof duly certified to as such by Mason
Dillard, Assistant United States Attorney for the
District of Oregon, of attorneys for defendant.

/s/ J. L. LICHTY

Attorney for Plaintiff

[Endorsed]: Filed February 17, 1945. [37]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court of the United States for the District of Oregon:

Defendant designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above-entitled case, it being Defendant's intention to designate the whole record:

1. Complaint
2. Amended Complaint
3. Answer of Defendant
4. Pre-Trial Order
5. Memo of Decision
6. Findings of Fact and Conclusions of Law
7. Motion
8. Order
9. Judgment
10. Transcript of Pre-Trial Proceedings
11. Transcript of Trial Proceedings
12. Notice of Appeal
13. Designation of Record

CARL C. DONAUGH,
United States Attorney for
the District of Oregon

J. MASON DILLARD
Assistant United States
Attorney [38]

United States of America,
District of Oregon—ss.

Service of the within Designation of Record is accepted in the State and District of Oregon this 26 day of March, 1945, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

/s/ JOHN LICHTY

Attorney for Plaintiff

[Endorsed]: Filed March 26, 1945. [39]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1693, in which United States of America is defendant and appellant, and Homer G. Johnson is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct

transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of the testimony taken in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of March, 1945.

[Seal]

LOWELL MUNDORFF,

Clerk

By F. L. BUCK

Chief Deputy Clerk [40]

In the District Court of the United States
for the District of Oregon

No. Civ. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Portland, Oregon, Monday, June 1, 1943
10:45 a.m.

Before:

Honorable James Alger Fee, Judge.

Appearances:

Mr. John Lichty, Attorney for Plaintiff;

Mr. William Langley, Assistant United States
Attorney, appearing for United States of
America, Defendant.

Cloyd D. Rauch, Court Reporter.

EX PARTE CONFERENCE:

The Court: You may proceed, gentlemen.

Mr. Lichty: Your Honor, this is an action brought by Homer Johnson against the United States based upon a contention of breach of contract. The Government has denied categorically [1*] every allegation of the complaint. It was served upon the Government—I think the action

*Page numbering appearing at top of page of original Reporter's Transcript.

was filed December 7th. Since that time the Local District Attorney's office has been attempting to get from the Bureau of Public Roads at San Francisco the facts in connection with the case. They have made a motion to postpone the trial, to which is attached an affidavit, but I don't think that we should postpone the shaping of the case in pretrial conference.

They have denied paragraph I, which is the jurisdictional requirement of residence of the plaintiff within this District. I am asking at this time if they contend that that is an issuable matter?

Mr. Langley: No, we will admit that the Court has jurisdiction.

Mr. Lichty: You admit the residence of the defendant within this District—or of the plaintiff, rather?

Mr. Langley: Well, yes, I suppose that we will admit that.

Mr. Lichty: Yes. And paragraph II they have denied, which is the fact "That on or about the 28th day of April, 1937, acting through the Bureau of Public Roads, United States Department of Agriculture, issued a call or invitation for bids for furnishing all labor and materials and performing all work for placing a surface course and bituminous treatment on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway—that is part of the allegation the defendant admits—Shasta Nation- [2] al Forest, Siskiyou and Shasta Counties, California. That as a part of said invitation, the Defendant submitted to pros-

pective bidders plans and specifications prepared by the Defendant upon which bids were required to be based.

Are you admitting that?

Mr. Langley: Yes, we will admit that.

Mr. Lichty: Paragraph III is "That the proposed project covered a distance of approximately sixteen and one-half miles, and a major and material factor in determining the price to be bid was the location and availability of an adequate and conveniently located source of material for the crushed rock surfacing to be produced by the contractor and applied upon the highway, which fact was well known to the Defendant."

Mr. Langley: We will admit that the district covered 16.16 miles and—we will admit the rest of that paragraph in there.

Mr. Lichty: We will accept that change in distance from 16½ to 16.16.

Paragraph IV quotes a portion of the specifications, which they have denied.

Mr. Langley: We will admit that.

Mr. Lichty: V, we allege, "That Plaintiff obtained from the Defendant a copy of said invitation or call for bids, together with a copy of the plans and specifications". That far I suppose you will admit in there. The balance of it I suppose is issuable. [3]

Mr. Langley: Let's see, how far were you down there?

Mr. Lichty: "That Plaintiff obtained from the Defendant a copy of said invitation or call for bids,

together with a copy of the plans and specifications”.

Mr. Langley: “——and examined the site of the project”—we will admit it that far.

Mr. Lichty: You will admit it that far. And the last one, two, three, four, five lines of that paragraph: “Plaintiff prepared and submitted a bid or proposal to the Defendant, which said bid was accepted by the Defendant, and on or about the 27th day of May, 1937, Plaintiff and Defendant entered into a contract pursuant thereto for the performance of the work herein before described.”

(Mr. Langley here addressed Mr. Lichty in a tone of voice inaudible to the reporter.)

Mr. Lichty: Well, your acceptance, I think, was May 27th. I think the actual signing of the contract was at a later date.

Mr. Langley: Well, we will agree to that. Now, just a minute, also, there,—we were wondering if we can agree as to the date at which work was to begin. We understand that plaintiff had notice to begin work on June 10th, 1937, and that he was to finish the work on October 7th, 1937, and then that the time was extended to October 20th, 1937; that the work was actually completed on August 2nd, 1938; that it was suspended from November 27th, 1927 to June 16, 1938, causing an overrun of sixty-three [4] days on the contract, resulting in the enforcement of liquidated damages—now, what was the sum?

Mr. Lichty: Well, of course, through a great portion of the complaint that thing comes up. Here

in paragraph VI, I merely would consider that when we come to the question.

Mr. Langley: All right.

Mr. Lichty: "That immediately upon notice to proceed with the work provided for by the said contract, Plaintiff moved in in the job and drilled the quarry preparatory to shooting"—I don't imagine that you would wish to admit that "immediately".

Mr. Langley: No.

The Court: Well, let's settle that point. When did you move in? When did you get the notice and when did you move in? You can agree on that, can't you?

Mr. Langley: We can agree on when he got the notice; probably not when he moved in, Your Honor.

Mr. Lichty: Have you the notice there, copy of the notice?

Mr. Langley: Yes.

Mr. Lichty: We will stipulate that telegram of June 7th, 1937 from the Bureau of Public Roads, addressed to Homer G. Johnson, Imperial Hotel, Portland, Oregon, directing him to proceed with construction within ten days, was received by him.

The Court: Now, when do you contend you went to work?

Mr. Langley: Your Honor, we contend that there were no productive operations on the job until August 9th, 1937. [5]

Mr. Lichty: The plaintiff will contend that on June 20th they went onto the job and commenced.

The Court: Well, that, apparently, is a question of fact, then. Can you give a schedule as to your operations, and do you have anybody that can check that?

Mr. Langley: Your Honor, our man, who is in the Army, made a diary, a daily diary. We have that here and intend to offer it as an exhibit.

The Court: Well, you might as well show it to Mr. Lichty right now.

Mr. Langley: Yes.

The Court: Maybe if he reads it over, why, you can agree to it. That will probably take a detailed examination, and under the circumstances it won't be necessary for the Court to remain on the bench while you are reading it. Call me when you are ready.

(A recess was thereupon had, after which pre-trial conference was resumed as follows:)

Mr. Lichty: Your Honor, on the question of when we proceeded with the work provided in the contract, we are contending that we commenced on or before June 20th. There are two days in there that we are not quite certain of, but he was on the job, starting, on or before June 20th. The Government, of course, denies that.

Mr. Langley: Yes, it says, "Plaintiff moved in on the job [6] and drilled the quarry preparatory to shooting". Our contention is that the first holes were drilled on July 6th. Now, the rest of that, we will admit that the question of soft rock was involved. We haven't any record in our diary of

Captain Wood about a conversation about soft rock, but we admit that someone called the District Engineer's office and Mr. Steele visited the quarry and there was some discussion between Mr. Steele and the Resident Engineer and the contractor's superintendent, and the agreement was reached that the quarry was satisfactory and the work proceeded. We deny that the plaintiff was ordered to proceed. Does that cover that?

Mr. Lichty: Well, of course, that is their contention. I would like very much, your Honor, in view of the answer that they filed, to have them amend their answer before this pre-trial order is drawn, because their answer is evidently not an answer at all.

The Court: No, I have no feeling about that at all. I can settle these facts just as well now, as to how much they are going to admit and how much they are going to deny. If there is anything in that that you don't think——

Mr. Lichty (Interrupting): In these fast-running admissions I don't quite get all the purport, that is all, when they say that an agreement was reached that the quarry was satisfactory, because there was no such agreement. We were contending all the time that it was unsatisfactory, that was our [7] contention, and they directed us to proceed.

The Court: Well, you can be more specific. Take it a clause at a time. "Plaintiff moved in on the job and drilled the quarry preparatory to shooting". He claims the first shooting was done on

July 6th, and, as I understand it, you contend to the contrary.

Mr. Lichty: We contend that it was before July 6th. We don't know the identical date, but somewhere between the 20th of June and the date that they set down.

The Court: " * * * and during said drilling operations due to the great quantities of soft rock encountered"—I understand there is no doubt about that, that there was some soft rock encountered?

Mr. Lichty: That is right.

Mr. Langley: Yes.

The Court: Now, then, " * * * Plaintiff became apprehensive of the quality of the rock in the said quarry": Now, how about that? Is that admitted or denied? Does the Government admit or deny that, or do you say you don't know?

Mr. Langley: Well, I think we ought to admit, your Honor, that the question of soft rock was raised at that time. We don't know anything about whether he was apprehensive. That is a conclusion.

Mr. Lichty: Well, the plaintiff did raise it.

Mr. Langley: Yes. [8]

The Court: And due to a request of some sort, emanating, I take it, from the plaintiff, the Resident Engineer of the defendant did examine the quarry?

Mr. Langley: Now, our complication there is there is that the Resident Engineer is the man in the Army and he has nothing in his diary about it, so we are not prepared to make a statement on that.

The Court: All right, that is denied and is an issue. Now, who notified the District Engineer's office? Do you know about that? They are claiming that it was done by the Resident Engineer.

Mr. Langley: Well, it was either the contractor or the Resident Engineer. We will admit that the District Engineer's office was notified.

The Court: Of the questionable character of the rock in controversy?

Mr. Langley: Yes.

The Court: And that office, that is, the District Engineer's office, asked the material engineer to make a further inspection?

Mr. Langley: That is correct, your Honor.

The Court: After the inspection, the plaintiff did proceed and use the quarry. It is a question of fact as to whether he was ordered to do it or it was done by agreement.

Mr. Langley: Correct, your Honor. [9]

The Court: All right. Now, then, the plaintiff opened the quarry by stripping and blasting?

Mr. Langley: Yes, your Honor, that is correct.

The Court: “* * * and completed the plant set-up adequate to produce the crushed rock”?

Mr. Langley: Yes, we admit that.

The Court: And if it had been proper rock it could have been completely used from that setup?

Mr. Langley: No, we deny that.

The Court: Now, then, I don't see your theory. Why do you deny that? It would seem to me that that would be—

Mr. Langley: All right, perhaps I am mistaken. I didn't quite understand. We will admit—

The Court: Crushed rock, if it had been good crushed rock suitable for using on the road it could have been conveniently used from that setup. Of course, I understand you are not admitting anything about it being improper, or anything of that sort.

Mr. Langley: You see, what caused me to hesitate is the phrase in there "if it had been proper rock". We don't admit anywhere that the rock wasn't proper.

The Court: No, that is what I understand.

Mr. Langley: Yes.

The Court: Let's say this: That rock could have been conveniently furnished from that setup for this road. [10]

Mr. Langley: Yes, that is correct.

The Court: All right. That contains no indication, then, as to the kind of rock it was.

Mr. Langley: No.

The Court: Did the plaintiff then crush or not six or eight thousand tons of rock, of surfacing material?

Mr. Langley: We claim thirteen thousand.

Mr. Lichty: From that setup?

The Court: Plaintiff crushed thirteen thousand from that setup,—will you accept that?

Mr. Lichty: Not from that setup, no, your Honor.

The Court: There is a question of fact, then, as to how much was crushed in the setup. Now, how about the next phrase, that this rock that was

crushed came mostly from the outside exposure of the quarry?

Mr. Langley: We deny that, your Honor.

The Court: All right. Now, then, that the engineer and inspectors of the United States complained about the quality of the rock which the quarry was producing?

Mr. Langley: Yes.

The Court: Why did you complain?

Mr. Langley: Because the grade didn't meet our standard.

The Court: The grade?

Mr. Langley: The grading of the material didn't meet the specifications in the contract. [11]

The Court: It wasn't on account of the quality of the rock?

Mr. Langley: That is correct.

The Court: All right. Did the United States then stop further production, the production of further material?

Mr. Langley: No, we deny that, your Honor.

The Court: Did they make a further inspection?

Mr. Langley: No. We state, in reply to that, that an inspection was made but it wasn't made at the request of the plaintiff.

The Court: Further inspection was made, but was not made at the request of the plaintiff. All right. That seems to be a square confession of avoidance.

Mr. Lichty: We don't contend in there that it was made at our request.

The Court: Well, I think that they have a right to state the qualifications, and if that is the qualification that they want to state I don't think anybody should object to it. Did you instruct plaintiff to proceed and use the quarry for the production of material then?

Mr. Langley: Our position is that we simply permitted him to; we didn't instruct him or order him.

The Court: All right. Then "plaintiff proceeded to strip and blast sufficient additional rock for his estimated requirements". Is that where the thirteen thousand comes in?

Mr. Lichty: That is where our contention comes in, that there was thirteen thousand up to the time that we asked for that [12] additional inspection.

The Court: All right.

Mr. Langley: We say, in reply to that, that there was an additional seven thousand, making a total of twenty thousand up to this point.

The Court: I see. And they thereupon attempted to deliver the rock on the project, and that the rock was rejected by the inspectors of the defendant repeatedly.

Mr. Langley: Our position on that, your Honor, will have to be this, that we have no record from our resident engineer, who is in the service, any person, as to this specific objection, but we will admit that periodically the rock was rejected.

The Court: And why?

Mr. Langley: Because it did not meet the grading requirements provided in the contract.

The Court: But there was no objection taken to the quality of the rock itself.

Mr. Langley: Not for this particular crusher.

The Court: Now, did the plaintiff, then, at the order of the resident engineer, confine the excavation to a few small pockets, which pockets were soon exhausted and the quarry was then rejected as totally unsatisfactory?

Mr. Langley: We are unable, because of the absence of our witness, to state whether the excavation was confined to a few small pockets and that these were soon exhausted, but we deny [13] that the quarry was rejected as totally unsatisfactory.

The Court: I will take up paragraph VIII, now, in that same manner.

Mr. Lichty: Are you considering paragraph VIII?

Mr. Langley. I am waiting for the Court.

The Court: No, I told you to go ahead and take up paragraph VIII and specify, deny or admit.

Mr. Langley: Oh, excuse me. We will deny paragraph VIII and state as our position that the plaintiff was warned that the material that he was taking or using for rock suitable for oil processing would be rejected.

The Court: Now, because of the rejection of the product did he have to find a new quarry?

Mr. Lichty: Before you start that, there is one correction I want to make in my allegation here. My client has told me that they were forced to make an additional haul from a rockquarry at the new source to his crusher of about fifteen hundred feet.

I misunderstood him and said that the rock was located about fifteen hundred feet from the original setup. It is just half of that haul, so the rock located, he says, was approximately seven hundred and fifty feet from the original setup.

Mr. Langley: That is in paragraph IX.

The Court: Yes.

Mr. Langley: We haven't finished with paragraph VIII yet. [14]

Mr. Lichty: I thought you had.

Mr. Langley: Mr. Reporter, we would like to strike out what we have already said about paragraph VIII and just deny it.

The Court: Well, as I understand, you did refuse to permit the use of part of the quarried material on the road, did you not?

Mr. Langley: How is that?

The Court: You have already said that in connection with VII.

Mr. Langley: In further qualification of our denial, we will admit that we denied to accept certain portions of soft rock as not being suitable for oil process.

The Court: Did plaintiff then open a new quarry?

Mr. Langley: Our position in that is that he opened a new face within the quarry about four hundred feet from the original face. That comes up in paragraph IX.

The Court: Well, I shouldn't think you would be in disagreement about that. I should think that distance—

Mr. Langley: About the distance?

The Court: You ought to be able to measure the distance.

Mr. Langley: Well, we did measure it.

The Court: Well the two of you ought to be able to measure it together and find out. There ought to be no question about distances. Have you a map of the locality?

Mr. Langley: We haven't a map available now, your Honor.

Mr. Lichty: My client says that in an air line it was [15] probably about five hundred feet, but the actual distance that the trucks traveled to and from was seven hundred and fifty feet.

The Court: If you are going to have to put proof in on each side on this question of the distances, the easiest way is to find out first and get an agreement. There ought not to be any question about how far a certain distance it. I don't see that there ought to be any debate about that at all.

Mr. Lichty: It is physically marked on the ground—

Mr. Langley: (Interrupting) All right, we will agree that it is approximately five hundred feet, although we measured it and it measured four hundred on our measurement. Apparently the plaintiff has never measured it; he has come down from fifteen hundred to five hundred.

Mr. Lichty: Well, he said that seven hundred and fifty feet was the distance that his trucks had to travel from one setup to the other, but the air

line is probably about five hundred. He never measured the air line.

Mr. Langley: We will agree that it is approximately five hundred. That will simplify it.

Now, so far as paragraph X is concerned, we deny that the quarry difficulty was the cause of the contract running over, and our contention is that the contractor ran over because of his failure to begin productive operations within a reasonable time after he was ordered to do so by the District Engineer under the contract, and we, so far as the dates are concerned there, we will admit that the contract was to be finished on October [16] 20th, 1937,—

The Court: It says 15th.

Mr. Langley: Well, we will go five days farther than that, October 20th, 1937; that it was suspended during the winter, from November 4th, 1937 to June 16th, 1938, and that the contract was finished on August 2nd, 1938, causing an overrun of sixty-three days, for which the contractor was assessed liquidated damages of \$1575. That takes in both X and XI.

Now, so far as XII is concerned, we deny that the defendant was ever compelled to open a substitute quarry. We admit that a new face was opened, but we claim it was a new face within the original quarry and was not a change of site within section of the contract -2.2 "Sources of Supply".

Now, as to VIII, we deny that there was a breach of the contract. Of course, that includes the rest.

Mr. Lichty: Well, will you admit that if there

is a breach of contract that those expenses were properly incurred?

Mr. Langley: No, we would be unable to do that.

The Court: Well, do you know what those expenses are?

Mr. Lichty: We submitted to the Department at San Francisco, at the close of the job, an itemized statement of them, which they have had ever since.

Mr. Langley: Yes, we have that, your Honor. We will introduce that as an exhibit. However, we are not prepared to admit the correctness of the claim. [17]

The Court: Well, could you admit that there was a certain amount additional expense that was caused by the delay, without admitting the fault, if any?

Mr. Langley: No, sir, nothing within the normal expectancy of that operation.

The Court: Well, in other words, you don't think that it was any more expensive?

Mr. Langley: No. In fact, we may be prepared to make a showing that it was cheaper to do that than to continue in the original faces. We do not want to make any admissions along that line, but that is the position that we are in, that we don't think there was any additional expense.

Mr. Lichty: I think we have agreed on that, that if we would try to produce it from the original quarry we probably never would have got done, that they probably never would take the rock, they

would reject it. I think we have agreed upon that, that it would cost us less to go over and open it up than it would have to continue on with the original quarry.

Mr. Langley: You see, here is the position we are in, we can't admit that this was a new quarry; we claim that it was within the source specified in the contract, so it is difficult for us to admit, then, that there would have been an additional expense in going from the one face to the second face, because we claim it was all within the one quarry, and if we admit that these sums were greater that would be also an admission, it [18] seems to me, that it was a justified move from one quarry to another quarry.

The Court: Well, I assume that we had better try this in two phases, then: First, the question of whether there was a breach of the contract; second, if the Court determines that the Government broke the contract, why, then—

Mr. Lichty: (Interrupting) Because much the longest phase of the case would be the second phase of the case.

Mr. Langley: Yes, I think that is a proper suggestion, your Honor, and we agree to that.

The Court: All right, you can frame your pre-trial order around that.

Mr. Lichty: On the first point, and then, if the Court holds with that, then we will go to the second one.

The Court: Yes. Now, as to exhibits, have you exhibits that you wish to introduce?

Mr. Langley: Yes, your Honor, we have several exhibits. There is one thing that I might bring to your Honor's attention that might be settled at this time. Of course, we are at a disadvantage in the absence of this man that was a resident engineer. We have his diary. Now, of course, we haven't any way of proving it; he isn't here, we can't prove the diary, but we are wondering if we could have a stipulation to have his diary admitted in evidence. That seems to be the only fair way of solving the problem of his absence. [19]

Mr. Lighty: Well, of course, we are not going to be bound by his ex parte statements in that diary, your Honor. If we did we would be walking right out of court.

Mr. Langley: Well, of course, then, that brings up the question again of whether or not we can proceed to trial. As I understand,—and I think it is the proper attitude of your Honor,—you felt we could go to trial, and if you felt there was any injustice it could be considered at that time, but the question on the date of the beginning of operations, which is an important matter in the case, the only evidence we have on that is this resident engineer, his testimony or his diary. You see, these gentlemen are his superiors, but all they have is his narrative report; their testimony would be hearsay. We can do this, your Honor: The legal question involved is the matter of whether or not there was a warranty, it seems to me, in this contract as to the quality and quantity of the material at the source. It

would be a piecemeal proposition. We can proceed on that point. We don't need his testimony for that.

The Court: You don't know where this man is?

Mr. Langley: Well, we think he is in New Guinea, but we can't determine from the Army. I had a telegram last Friday from the Attorney General asking that the case be postponed six months on recommendation of the Bureau of Roads, in the hope that they could make arrangements with the Army to have him return, but I did not suggest that to your Honor because I know that we have [20] got to expedite these cases as much as possible. Now, so far as his deposition is concerned, we might be able to take his deposition, but it would be based on this diary; we would have to send him a copy of the diary and prepare questions based on the diary, and Mr. Lichty would likewise have the advantage of the diary. That would be all we have.

The Court: Well, I would suggest that you have to get to some sort of agreement about this, either have to use the diary or allow the Government to take his deposition. I am not so sure that the diary is inadmissible, the circumstances accounting for your inability being called to my attention. I am not ruling on it. If the diary is kept in the course of official business and the inability of the writer of the matter being accounted for, it is possible,—I don't know; I am just speculating on that.

Mr. Langley: Yes. There was a new statute passed, I think, in '41, by the Oregon Legislature on that.

The Court: In any event, you would have more—I may say this, that this being the only witness for the Government, apparently, if it is not admissible—

Mr. Lichty: (Interrupting) May I suggest, your Honor, that after the pre-trial order is made I would have no objection to having deposition prepared and prepare cross-interrogatories and try to get the matter to his commanding officer.

The Court: When was this case brought? [21]

Mr. Lichty: December 7th. There is no need, as I understand it, to introduce any exhibits at this time except on the first phase as to whether or not there was a breach of contract.

The Court: Yes. The Court will allow you to go ahead with the introduction of the documents in my absence.

Mr. Lichty: Yes.

The Court: Court is now in recess.

(A recess was thereupon declared, the Court left the bench, and in the absence of the Court proceedings herein were continued as follows:)

Mr. Lichty: I want to introduce four photographs for the plaintiff as being photographs of the original quarry in question.

(The four photographs referred to were thereupon marked as Plaintiff's Pre-trial Exhibits 1, 2, 3 and 4.)

Mr. Lichty: Go ahead, Mr. Langley and put your exhibits in.

(Mr. Lichty then departed.)

Mr. Langley: As Government's Exhibit 5, photostatic copy of Bid, Contract, and Bond for Forest Road Construction, this photostatic copy being under the seal of Philip B. Fleming, Federal Works Administrator.

(Said certified photostatic copy of Bid, Contract, and Bond for Forest Road Construction, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 5.)

Mr. Langley: 5-A is General Specifications FR50-1935 for Forest and Park Road Construction.

[22]

(Said General Specifications FR50-1935 for Forest and Park Road Construction, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 5-A.)

Mr. Langley: As Government's 6, photostatic copy of letter dated June 7th, 1937, addressed to Homer G. Johnson, signed by M. L. Wilson, Acting Secretary, Department of Agriculture, notification of acceptance of proposal.

(Said certified photostatic copy of letter, M. L. Wilson, Acting Secretary of Agriculture, to Homer G. Johnson, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 6.)

Mr. Langley: As Government's Exhibit 7, telegram dated June 7, 1937, addressed to Homer G. Johnson, notice to start operations within ten days.

(Certified photostatic copy of telegram, bearing date June 7, 1937, Bureau of Public Roads

to Homer G. Johnson, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 7.)

(Thereupon, at 12:30 o'clock P. M., June 1, 1943, pre-trial conference herein was suspended.) [23]

Monday, June 7, 1943, at 10:30 o'clock A. M., the production and marking of pre-trial exhibits herein was resumed, as follows:

(In the absence of the Court)

Appearances:

Mr. William Langley, Assistant United States Attorney, appearing for defendant.

(The absence of Mr. Lichty was noted.)

Cloyd D. Rauch, Court Reporter.

Mr. Langley: Letter dated June 30th, 1937, signed by Homer G. Johnson, acknowledging receipt of instructions to proceed with this project.

(Certified photostatic copy of letter bearing date June 30th, 1937, Homer G. Johnson to Bureau of Public Roads, San Francisco, California, so produced, was thereupon marked as Defendant's Pre-trial Exhibit 8.)

Mr. Langley: Letter dated July 14, 1938, addressed to Homer G. Johnson, signed by C. H. Sweetser, being Change Order No. 1.

(Certified photostatic copy of letter bearing date July 14th, 1938, C. H. Sweetser, District Engineer, to Homer G. Johnson, Change Order

No. 1, so produced, was thereupon marked as [24] Defendant's Pre-trial Exhibit 9.)

Mr. Langley: Letter dated October 1, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, temporary suspension of construction.

(Certified photostatic copy of letter bearing date of October 1, 1937, Joseph E. Wood, Junior Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 10.)

Mr. Langley: Letter dated October 4, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction.

(Certified photostatic copy of letter bearing date of October 4, 1937, Joseph E. Wood, Junior Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 11.)

Mr. Langley: Letter dated October 15, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend construction.

(Certified photostatic copy of letter bearing date October 15, 1937, Joseph E. Wood to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 12.)

Mr. Langley: Letter dated October 16, 1937, addressed to [25] Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction.

(Certified photostatic copy of letter bearing date October 16, 1937, Joseph E. Wood, Junior Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 13.)

Mr. Langley: Letter dated November 5, 1937, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to temporarily suspend all construction.

(Certified photostatic copy of letter bearing date November 5, 1937, Joseph E. Wood to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 14.)

Mr. Langley: Letter dated June 13, 1938, addressed to Homer G. Johnson, signed by Joseph E. Wood, direction to resume construction operation.

(Certified photostatic copy of letter bearing date June 13, 1938, Joseph E. Wood, Assistant Highway Engineer, to Homer G. Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 15.)

Mr. Langley: Letter dated June 20th, 1941, addressed to Homer G. Johnson, signed by C. D. Curtice, Acting Commissioner of Public Roads, refusing consideration of Johnson's claim. [26]

(Certified photostatic copy of letter bearing date June 20, 1941, consisting of two pages of typewritten matter, C. D. Curtis, Acting Commissioner of Public Roads, to Homer G.

Johnson, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 16.)

Mr. Langley: Letter dated May 13, 1941, addressed to Public Roads Administration, signed by Homer G. Johnson, asking consideration of his claim previously presented to District Engineer's Office, San Francisco, California.

(Certified photostatic copy of letter bearing date May 13, 1941, Homer G. Johnson to Public Roads Administration, Washington, D. C., consisting of two pages of typewritten matter, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 17.)

Mr. Langley: Letter dated June 15, 1939, addressed to Homer G. Johnson, signed by C. H. Sweetser, District Engineer, denying claim submitted by Johnson, consisting of six pages.

(Certified photostatic copy of letter bearing date June 15, 1939, C. H. Sweetser, District Engineer, to Homer G. Johnson, consisting of six pages of typewritten matter, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 18.) [27]

Mr. Langley: Letter dated January 18, 1939, addressed to C. H. Sweetser, District Engineer, signed by Homer G. Johnson, presenting claim of Johnson, consisting of twenty-four pages.

(Certified photostatic copy of letter bearing date January 18, 1939, Homer G. Johnson to

C. H. Sweetser, District Engineer, and enclosed tabulations, consisting of twenty-four pages of typewritten matter, so produced, were thereupon marked and identified as Defendant's Pre-trial Exhibit 19.)

Mr. Langley: The original diary kept by Joseph E. Wood of daily events concerning the involved project.

(Said original diary, bearing number 10, J. E. Wood, 1937, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 20.)

Mr. Langley: Original Daily Report for Crushed Rock Surfacing, kept by Joseph E. Wood, of the involved project.

(Said daily report for crushed rock surfacing, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 21.)

Mr. Langley: Plan and Equipment Questionnaire, executed by Homer G. Johnson, concerning the involved project.

(Said plan and equipment questionnaire for engineering construction, so produced, was thereupon marked and identified as Defendant's Pre-trial Exhibit 22.)

(Whereupon pre-trial conference herein was concluded.) [28]

[Title of District Court and Cause.]

CERTIFICATE

I, Cloyd D. Rauch, hereby certify that on June 1st and 7th, 1943, I reported pre-trial conference proceedings had in the above entitled court and cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 28, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates as aforesaid, and of the whole thereof.

Dated this 14th day of June, 1943.

CLOYD D. RAUCH

Reporter.

[Endorsed]: Filed June 16, 1943.

In the District Court of the United States for the
District of Oregon

Civil No. 1693

HOMER G. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Portland, Oregon, Tuesday, April 18, 1944.

10:05 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. John Lichty,

Attorney for Plaintiff.

Mr. William Langley,

Assistant United States Attorney, appearing
for United States of America, Defendant.

PROCEEDINGS

The Court: All right, Mr. Lichty and Mr. Langley.

Mr. Langley: Your Honor, I would like to ask permission for Mr. Brown and Mr. Steele—they are from the Bureau of Roads, of San Francisco—to sit at the counsel table with me.

Your Honor, concerning the pre-trial order, these gentlemen asked me if I would insert something in

the pre-trial order that has not been in it previously, and I have talked to Mr. Lichty about it. I understand he has no objection. Instead of retyping the complete pre-trial order I have just got a page to substitute here, if there is no objection.

Mr. Lichty: Your Honor, I don't think that it adds anything material to it. It is merely one of their contentions that they will make. I think it is broad enough, but if they deem it necessary I have no objection.

The Court: It may be done.

(Opening statements were here made to the Court.)

The Court: Call your witness.

PLAINTIFF'S EVIDENCE

HOMER G. JOHNSON,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. Will you state your name, please.

A. Homer G. Johnson.

Q. Mr. Johnson, you are the plaintiff in this action?

A. Yes, sir.

Q. I hand you Defendant's Pre-Trial Exhibit 5A, ask you if those were the specifications that were provided to you, or a copy of the same. [2*]

A. Yes. This is a general specification.

(Testimony of Homer G. Johnson.)

Q. A copy of the general specification. Did you examine those specifications and make a bid on the project covered by them? A. Yes, sir.

Q. Did you examine the site of the job prior to making your bid? A. Yes, sir.

Q. What did you find there at approximately the location three-tenths of a mile right of Station 1239?

A. A rock quarry.

Q. Keep your head up and your hands down. I can't hear you.

A. I say the rock quarry that had been selected for the job.

Q. Did the quarry have the appearance of being a good quarry for this job?

A. Yes. It looked like it had every indication that the rock would be all right and it would be a practical quarry to operate in.

Q. Did you also examine the area about five-tenths of a mile right of Station 870?

A. Yes. I went in and looked over the gravel pit.

Q. Had that been opened?

A. Yes, that had been opened up, and there was a creek running through it. It was a little hard to get around in there on account of water was flowing all over the place, and I walked around it. There seemed to be lots of gravel there.

Q. Now did you, at the request of the Government and prior to entering on the job, submit to them a plan and equipment question- [3] naire?

A. Yes, there was a plan.

(Testimony of Homer G. Johnson.)

Mr. Lichty: I will ask to have the Pre-Trial Exhibit previously handed to the plaintiff marked in evidence.

The Court: It is admitted.

(The General Specifications FR50-1937 for Forest and Park Road Construction, so offered and received, having been previously marked "Defendant's Pre-Trial Exhibit 5A", was marked Plaintiff's Exhibit 5-A.)

Q. Handing you Defendant's Pre-Trial Exhibit 22, is this the plan you submitted to the Government for operating that job?

A. Yes, this seems to be.

Q. Will you examine the equipment schedule that you have listed in there.

A. Yes.

Q. Was that equipment furnished on that job?

A. Yes. That is practically identical with the equipment that was used down there.

Q. Did the Government at any time question the adequacy of your plan and the equipment you proposed to put in there?

A. No, I don't think so.

Q. Not previous to doing the work, at any rate?

A. No.

Mr. Lichty: I ask to have that marked in evidence and admitted.

The Court: It is admitted. [4]

(The Plan and Equipment Questionnaire for Engineering Construction, executed by Homer G. Johnson, so offered and received, having been

(Testimony of Homer G. Johnson.)

previously marked "Defendant's Pre-Tritl Exhibit 22," was further marked Plaintiff's Exhibit 22.)

Q. Mr. Johnson, in making your bid and proposal, did you rely on the adequacy of the quarry approximately three-tenths of a mile right of Station 1239?

A. Yes, I relied upon those two sources.

Q. What plan did you propose for the production of the cover material or oil rock when you made your bid?

A. Well, there was a very strict specification on that oil rock as far as the texture was concerned and we planned on getting the oil rock mostly out of the quarry on account of the fact that the gravel pit would be very difficult to crush the oil rock out of on account of the gravel was quite fine and it required I think material up around an inch and a quarter or an inch and a half as the minimum before you could start making the oil rock out of it and there wasn't a great lot of that material in the gravel pit.

Q. What is the relative economy in the production of your oil rock as the base course is being produced and having to produce it subsequently?

A. Well, there was two very important factors there which would require the oil rock to be produced from the quarry. One was it would be much cheaper to do it and another one would be that we [5] would need the oil rock before we ever got to the gravel bar, because we were planning to start at the east end of the project, which was the end where the

(Testimony of Homer G. Johnson.)

rock pit was, and if we didn't get out oil rock where the rock pit was as we finished surfacing on the road and put the prime coat on we wouldn't have any chance to put the oil coat on and if we didn't get the rock out of that setup we would have to complete the road clear over to the gravel pit before we would be able to get out any oil rock to do heavy oiling with on the east end of the project. Then another thing was that when you could take that oil rock out of the crushed stuff there wasn't any specification for material, coarse material of maximum size, which was three-quarter minus, and there was grading on the stuff from one-quarter down but there was no grading between a quarter and three-quarters and you could rob a little of that oil rock out of there on that upper size and that would help bring up the fine on account of there was a heavy fine requirement and the surfacing material required around 50% passing the quarter, where the ordinary crushing machines don't produce quite that high a content without re-crushing the material after it was ground down; in other words, without extensive recrushing; and, as I say, by robbing a little of that stuff above a quarter, between a quarter and three quarters, which is what the oil rock consisted of—the size of the oil rock was from one-quarter to one-half—and robbing a little of that material out of there along as we were crushing the surface course, that would give us a chance to gain that material [6] and then reduce the large content in the surface material, and consequently at the same time bring up the fine content which would help

(Testimony of Homer G. Johnson.)

in the crushing. At the same time we would be getting our oil rock out along so as to have it on hand when we were going to need it. When we would get, say, five miles of surfacing done we would probably need our oil rock.

Q. Now your bid was accepted and the contract was entered into? A. Yes.

The Court: His bid was quite low, as I remember it. Am I right in my recollection?

Mr. Lichty: Q. Were the bids of much variation?

A. Yes. My bid was considerably lower than the others were.

Q. Now on about June 7th, I believe, you received a telegram from the Bureau of Public Roads to proceed?

A. I think it was dated June 7th but I actually got it on the 9th. It came to my office. At that time I had my office in the Imperial Hotel. It came there on the 8th but I didn't receive it until the 9th.

Q. Now about June 16th or 17th you went down to the job, got on the job on June 18th, I believe, did you not?

A. I am not sure exactly when we did go down. I didn't make a memorandum of that. Anyhow, I got Mr. Hildeburn, who was figuring on being superintendent, and Mr. Thomas, who was going to do the trucking, and we got in my car and drove down to the project and spent a day there I think on the project, as I remember [7] it, and we met Mr. Woods, the resident engineer, who had already arrived there a few days before that, and I told him that Mr. Hilde-

(Testimony of Homer G. Johnson.)

burn was going to be in charge of the job and he would be down in a few days and get going to work as quick as possible.

Q. Did you go with Mr. Wood to that quarry site at that time?

A. No, we didn't go there at that time.

Q. You didn't go there at that time. You went over the job with Mr. Hildeburn and Mr. Thomas?

A. Yes. We drove over the job rather quickly and then scouted around.

Q. You made your plans with them for the method of proceeding to do the job?

A. Well, with Mr. Hildeburn, yes. In other words, we talked it over in general and decided on some of the things that would have to be looked after right away about getting lumber ordered and various things, and equipment that would come in first, and so forth.

Q. Now you and Mr. Hildeburn and Mr. Thomas then returned to Portland?

A. Yes, we returned to Portland.

Q. And about how long after that did you send Mr. Hildeburn back with men and the compressors to start drilling?

A. Well, Mr. Hildeburn got ready as quick as he could. Of course they moved down. He had a family to take along. [8]

Q. About how long was it? That is all I want to know.

A. Oh, about a week or so, maybe. Somewheres around a week, I would say.

(Testimony of Homer G. Johnson.)

Q. Now what is the first intimation that you had that the quarry which was being drilled by Mr. Hildeburn would contain soft material?

A. Well, it was somewhere along a few days after the 4th of July they started in drilling, I think. I know I talked to him every night or two on the phone, and I remember talking to him in regard to working over the 4th of July, if possible, in order to hurry the job along. Sometimes the crew was hard to keep on the job during the 4th of July and we wanted to hurry the job along so I talked to him in regard to that, and then in a few days afterwards he called me—I think it was the next time he called me, which was three or four days afterwards, if I remember right, and he mentioned I had better kind of softpedal the thing, because he was inclined to think the quarry was going to be a failure, and find what they had found in this coyote hole.

Q. Did you go down and talk to Mr. Wood about the soft material shortly after that?

A. Well, I think he called me again, as I remember, and——

Q. Who called you? A. What is that?

Q. Who called you?

A. Mr. Hildeburn, and he stated that Mr. Wood had sent for the [9] material engineer in San Francisco to come up—and the headquarters were at the District Offices in San Francisco—to come up and take a look at this quarry and decide what they were going to do about it, and about what they had

(Testimony of Homer G. Johnson.)

found in this coyote hole, and he said Mr. Steele, I think, was the material engineer in——

Mr. Langley: Let's not have all this hearsay. If Mr. Hildeburn knows about this let him testify about it, not Mr. Johnson.

Mr. Lichty: Q. Did you talk to Mr. Wood, or Mr. Steele, or any of the engineers of the Government, about this material being soft before the quarry was shot; and, if so, when?

A. Well, when Hildeburn told me to come down, why, Mr. Steele was there. We all met out there at the quarry that morning; as I remember it, it was in the morning; and we discussed the quarry situation then.

Q. What, if anything, did Mr. Steele, Mr. Wood, or any of the Government engineers, tell you about the material that had been discovered to be soft in the quarry?

A. Well, we had quite a little conversation about it and they said, "Well, the material is not going to be what we thought it was, or what we expected, or what we would like, but we will have to try to make the best of it, as we have searched the country all over for rock quarries and there wasn't nothing else available," and discussed the various methods to operate and I thought if we could mix this soft rock it was a much greater portion of good [10] rock than there was bad rock, and I thought if we could mix this bad rock in with the good rock we would probably get by with the stuff and make a good road out of it.

(Testimony of Homer G. Johnson.)

Q. You did proceed after that to shoot the quarry? A. Yes.

Q. Now will you explain to the Court the equipment that you put in after the quarry was shot, and how that quarry was operated?

A. Well, we took down a jaw crusher for a primary breaker and in order for the rock to go in first. When the rock would come out of the quarry it of course would take quite a large size rock. Then we used a three foot cone crusher; then we used to set a roll for finishing a quarter or even to make the real fines with; then we had a belt conveyor and screens separating the material, or scalping it and separating it and grading it, and so forth, and we had a set of scales for weighing, and we had the equipment, the engines and power plant, and our compressor and pipes for drilling the quarry; and we had road graders and rollers for placing the stuff on the road with, and water tanks, and of course trucks.

Q. Now what was your method that you used in moving the rock from the base of the quarry into the crusher?

A. Well, we set up what we ordinarily call an ordinary dragline system and have a bucket that will drag back and forth through the quarry and pick up this rock and drag it to the crusher. It has an endless line on it that works with one line attached to [11] one drum to drop the bucket and another line fastened to the other drum to the other end of the bucket, and in that way it pulls

(Testimony of Homer G. Johnson.)

it back and forth, whichever way you turn with the hoist.

Mr. Lichty: I might ask the Court one question, if the Court will permit it. Just how familiar is the Court with the production of material like this? Is the Court familiar with the draglines and power shovels, and different equipment, and how they are operated or not? I don't want to waste a lot of time trying to educate your Honor on something you already know.

The Court: Well, I pretty near missed my Christmas dinner by listening to a rock crushing and pavement case here the last week of the year that Patterson had out at Hillsboro, and Bullivant suing for a contractor and a subcontractor, and I should have.

Mr. Lichty: That will simplify the making of the record.

The Court: I thought they should have gotten through in two days and they took seven.

Mr. Lichty: That will simplify making the record, your Honor.

The Court: They didn't get through until four o'clock the day before Christmas. If we ever saw a man throw away a good case by using up too much time and making the jury wonder whether they were going to get home by Christmas or not, that was it.

Mr. Lichty: Q. Mr. Johnson, were you present on the job—relatively how much time did you spend

(Testimony of Homer G. Johnson.)

on this job from the time it started until they finished? How often were you there approximately?

[12]

A. Well, I was there pretty much all the time after, say, around the first or the middle of July, the 20th of July. I was there a great deal of the time. That is, I would be away maybe for a day or two and come back and stay two or three days and maybe go again.

Q. Did you build a camp for the project to house the men that were working on it?

A. Yes. We had to build camp for about fifty men. We had to take care of our own men and get a place for the Government inspectors.

Q. Did you see the operation of this quarry No. 1, as we have designated it, almost weekly after the middle of July?

A. Yes. I was there fully every week.

Q. Just explain to the Court what developed in the quarry as you were producing the material.

A. Well, as we started in to produce the material we had merely shot, oh, I would say a little deeper than this room, perhaps, and about half again as wide, and about half again as long, and that was in this ridge that run through the country there practically vertical to where the ridge run, and we started in, say, on the right hand side, and we put our block back behind and put out our lines and started with a Bagley scraper, bringing in the stuff, you know. Say, assume that door back there was the center of the quarry and we started in just

(Testimony of Homer G. Johnson.)

slightly to the right of that and we worked to the right a little ways on the rock and found it was pretty soft over there on the back end and so we had to switch the line to the left, to go around to the left, and we [13] kept on operating that way.

Q. About how far would you get down from the top before you would hit this soft rock?

A. Well, I would say it was around—oh, to start with it was probably around twenty or twenty-five feet.

Q. Then you would swing——

A. However, as we went to the right it was soft right to the top of the quarry. In the quarry it was soft right to the top. We had to abandon the right hand side. At least probably ten or fifteen feet of the material that was shot out, we had to abandon that.

Q. Now what would the excess of this soft material do to your crushing equipment?

A. Well, on the recrushing end of it was where it would work the worst. It would go through the jaw crusher and go through the cone crusher pretty good, but when they got to running it through the rolls to break up those fines, which was required in the material that stuff was slightly damp and that rock which would not break would drop away like from your hard rock. You see, it was just sort of mashed as it went through the rolls and the moisture would sort of solidify it to the rolls and the rolls would build up. And we worked out methods to try to scrape it off from time to time but they

(Testimony of Homer G. Johnson.)

were more or less impractical; at least they didn't work very good and it would be hard to keep it from build- [14] ing up on the rolls and as it built up the rolls and enlarged the rolls that would throw the shafts out of line and they would work that way so long and then break right in two.

Q. How many shaft breakdowns occurred, as you recall, on that job?

A. We had three or four.

Q. How long would you have to shut down when a breakdown like that occurred?

A. Well, the best we done was about two days and two nights. We had three shifts of men and we worked day and night on it and fixed it up.

Q. Where would you have to get your replacement shafts?

A. Well, either Portland or San Francisco. I think one came from Spokane. It was expressed all the way from Spokane. That was the nearest we could get it.

Q. Had you used the same rolls on the crusher in another job?

A. Yes. I had used it two years before that. I had rented it out on one job.

Q. Had you ever had shafts break before?

A. No, there had never been any shafts broken yet before.

Q. Have you used the same equipment since?

A. Yes. It was used up until along about last Christmas and I sold it a short time ago.

(Testimony of Homer G. Johnson.)

Q. Did you have any other break on any quarry work after this job?

A. No, it has never broke a shaft since.

Q. Describe to the Court when you would get down to this soft [15] material the delays that would be occasioned in inspection and rejection of your material.

A. Well, we would get in to the different areas in the quarry where this stuff would be more predominant than in other areas, and then when we got into those areas, why, the material wouldn't weigh as much as the heavier, the better material, and of course the inspectors soon learned that was the way to check it, and of course a lot of times the load would be loaded up and they would get on the scales and they would see it was light, even if we have loaded it about the same. Well then, they would hold up the trucks and it would take a lot of investigation of the material in the truck and then sometimes go back in the quarry and look around. But sometimes they would hold the truck, or dump the material in the truck, or hold it there or something, until they got hold of the Resident Engineer, and there was a lot of delay holding the trucks that way.

Q. Were there many days when the breaking of the shaft would shut you down because the material was not satisfactory?

A. Yes, there was quite a lot of days we had to shut down and change or do something to improve the condition.

(Testimony of Homer G. Johnson.)

The Court: You had better put in something about his experience in this line of work.

Mr. Lichty: Q. Mr. Johnson, how long have you been a contractor engaged in dirt, rock moving, graveling, paving?

A. Well, about twenty-three years.

Q. Where have you lived during this time? [16]

A. Well, I used to live down at Roseburg and I have been living in Portland for a good many years.

Q. How many years in Portland?

A. Well, I have lived eleven years at the Imperial Hotel without checking out, and I have forgotten how many more years since I came here.

Q. Have you performed other jobs for governmental agencies, state, United States, counties, on road work where the conditions were similar to those that you saw when you first bid on this job?

A. Oh, yes, lots of them, for everybody around. I worked for the State of Washington, the Highway Department, the State of Oregon, and the Bureau of Public Roads at Ogden, and the Bureau of Public Roads here at Portland, and—oh, some of the other counties.

Q. What was the contract price for this work?

A. I have forgotten now.

Q. What was your original contract price, do you recall?

A. Well, I think the total bid was to be eighty-six thousand, something that way, eighty-four thousand, something that way. I have forgotten now.

(Testimony of Homer G. Johnson.)

Q. You have operated many contracts for dirt moving, graveling, grading, of this same size?

A. Oh, yes, lots of them.

Q. You have had contracts running how high?

A. Oh, two hundred fifty thousand, three hundred thousand dollars. [17]

The Court: Did you know that Shasta country?

Mr. Lichty: Q. Had you worked in the Shasta country before?

A. Well, no, I hadn't never worked down around in that area before.

The Court: Ordinarily wouldn't a contractor make more of an investigation of rock than was made here? You ask him that.

Mr. Lichty: That is something that we are contending that he had the right to rely on, and that the Government would not have provided that he would have to use this rock if they hadn't satisfied themselves thoroughly it was satisfactory.

The Court: Just the same, I would like to get a statement from him as to how things are done usually in railroad construction and highway construction where rock is involved.

Mr. Lichty: You may ask him the question direct, if you care to.

The Court: No. You do it. You know what I want. This seems like a blind pig in a poke to me.

Mr. Lichty: Well, of course, you are just meeting our contention on it. That is, if they had not put that in—you might say to produce our own experience if they hadn't done that, but this lowered

(Testimony of Homer G. Johnson.)

our guard and we were entitled to rely on it, and I will be able to submit to your Honor a number of cases where the same contention was made by the Government and——

'The Court: Let's have his view on it anyhow. A lawsuit is always a poor substitute, as every contractor knows.

Mr. Lichty: Q. Why did you not make a more extensive investi- [18] gation of this rock that was used in that quarry?

A. Well, I will say contractors use certain prices and those prices are developed by the various engineers of the various road building bodies and the contractors themselves, and some places, why, they advertise a job and they say they want certain materials and they let it go at that, and then other places they say, "Well, there is a quarry site here, or a gravel pit here," and so forth, and when they do, why, generally those are picked out to be the best and more suitable material generally on the job that is available for the job, so the contractors have got to where they rely upon those things, and when they get specifications for a job they immediately look up the sources of the material and if the sources are stated then they go right to those sources and if they look all right, in other words, if they look as though the material is there, there is nobody can see in the ground, one man can't see in the ground any more than another can, and so we look the situation over and if every indication looks

(Testimony of Homer G. Johnson.)

favorable that the material is there, or all right and everything, why, we know they have specified it and we assume they stand back of it, which has been practically the custom, I take it. Up here I don't know of any case where they have refused to stand back of the material where they have specified it. Especially *there* the specification in regard to the sources of the material was just a little different than it is generally in these plans and specifications. There they said that you could not take the material from any other sources, only these sources that they would specify. Why, the general provision—I mean, the general usage of that sort of a term in most of these contracts, like Oregon and Washington, and the Bureau of Roads here uses, say, that certain materials are available in certain places the state has picked out or the Government, and that other materials can be used if they meet the requirements, and it is up to the contractor to assume the responsibility of getting this and providing the material in the specifications.

Mr. Lichty: Is that enough, your Honor?

The Court: It gives his view.

Mr. Lichty: Yes.

Q. Now as the job progressed here—first, at the start of the job did you take a picture of the face of this quarry before you had shot it?

A. Yes, I took it.

Q. I hand you Plaintiff's Pre-Trial Exhibit No. 26 and ask you if that is the picture you took of the quarry before it was shot?

(Testimony of Homer G. Johnson.)

The Court: Do you want to break the morning?

Mr. Lichty: I would like to have about five minutes, if I might.

The Court: All right. Take your time.

The Witness: Yes, I think that——

Mr. Lichty: Just hold it until afterwards. [20]

(Short recess.)

Mr. Lichty: Q. Mr. Johnson, is that photograph, Plaintiff's Pre-Trial Exhibit No. 26, an accurate representation of the face of that quarry before you started your operation?

A. Yes. That looks like it was the original, or a picture of the original hillside there.

Q. You took the picture?

A. No, I didn't take that picture.

Q. Who did, do you know?

A. I don't know.

Mr. Lichty: Has it been marked in evidence yet? If not, I will offer it in evidence.

The Court: It is admitted.

(The photograph so offered and received, bearing the legend on the back, "Taken 1937. View of face No. 1 of Johnson quarry before shooting by Johnson", having been previously marked Plaintiff's Pre-trial Exhibit 26, was further marked "and trial".)

The Court: Just put all the pictures in. Whatever they show I am sure counsel will agree. Mr. Langley, all these pictures may go in, I am sure?

Mr. Langley: Yes, your Honor.

(Testimony of Homer G. Johnson.)

The Court: They are all admitted as being photographs of what they purport to be on the job.

Mr. Lichty: Well, just admit the whole bunch.

The Court: You can mark them later, Mr. Person. Give them the [21] same numbers as the pre-trial exhibits.

(Pursuant to the foregoing the photographs previously offered upon pre-trial as Plaintiff's Pre-trial Exhibits 1, 2, 3 and 4, were further marked "and trial"; and the photographs marked Plaintiff's Pre-trial Exhibits 24, 25, 27 and 28, were further marked "and trial".)

Mr. Lichty: Q. Handing you, Mr. Johnson, photograph marked Pre-Trial Exhibit No. 4, I will ask if you will explain what that represents.

A. This represents the quarry on the right hand side, which shows a great deal of the rock that was shot up but never used due to the fact that it was soft. This was apparently taken after the abandonment of the quarry.

Q. Handing you Plaintiff's Pre-Trial Exhibit No. 2, what does that photograph disclose?

A. Well, that shows the position just about the center of the original quarry and it shows the same as it was abandoned.

Q. With the material left in the quarry that was too soft to use?

A. Yes. It shows it just about as it was abandoned, as I remember it.

Q. Handing you Plaintiff's Pre-Trial Exhibit No. 1, I will ask you what that represents.

(Testimony of Homer G. Johnson.)

A. Well, this is a very good photograph of the natural face of the quarry as it was abandoned. This photograph was taken on the left [22] hand side of the quarry.

The Court: If he is an experienced man—I have no doubt he is—you had better have him in a few words tell just how bad he thinks this material was, from his experience.

Mr. Lichty: Q. Answer the Judge just as he has asked it. In your opinion and from your handling of this material, how bad was it compared to a good commercial quarry?

A. Well, the material was very much softer. In other words, I could take a piece of rock similar to a stick of stove wood and you could take your jack knife and practically whittle it just like you would a stick of stove wood.

The Court: Well, did he ever get into bad rock before?

Mr. Lichty: Q. Have you ever attempted to use rock of this quality for road building material before?

A. I never got into a rock like that before. In other words, that soft rock looked like good rock. It seemed to be the same material, and all. But to describe it, I would say it would be like going out to a brick plant and seeing clay that had been baked hard into salable brick and another brick that was just almost in a dough state yet. That is very similar to this rock. In other words, the outer exposure of the rock was hard but as you

(Testimony of Homer G. Johnson.)

got back into it the same class of rock practically was found to be material that was soft.

The Court: What made it soft? Did it have moisture in it?

A. It apparently had never hardened when the original formation [23] was created.

The Court: It didn't have moisture in it?

A. No, it wasn't damp. It was just material that didn't harden. It was the same class of material, and while it was hard on the outer exposure it was soft inside. After you got in it was soft. You could take your knife and stick it down in it.

The Court: How would you classify it by common description or any other way?

A. I am not enough of a geologist to tell you what happened there or what kind of rock it is exactly, or what happened, why the outside was hard and the inside was soft.

The Court: Well, is it your idea that the Government's test pits, or whatever they had done, had gone deep enough?

A. Well, the Government didn't test it out. There was quite a hole in the front of the quarry that was made there by some county forces, I presume, or I understood a WPA crowd had been working in there getting some rock for some work and they had made a gash in there probably eight or ten feet deep and maybe thirty feet long.

The Court: Did that run into the soft material?

A. No, that didn't open the soft material.

(Testimony of Homer G. Johnson.)

The Court: And so your idea is that the Government had just figured, "This is all right from the past use of it and from surface appearance"?

A. Yes. There wasn't any indication that it would ever lead into [24] soft rock. The material looked like it would hold its consistency and looked like there was worlds of it there.

The Court: Was there any other work going on in that neighborhood on that same highway at the time? You had five miles of it?

A. No; we had sixteen miles.

The Court: Sixteen. Was there any other work going on?

A. Well, there was no work in that neighborhood. Farther east there was a project being built further east.

The Court: What highway?

A. What they call Mr. Shasta-Mt. Lassen highway; from Mt. Shasta City and goes out through McCloud and comes out into the Alturas Highway.

The Court: Oh, yes. I have driven through there. Now where was this quarry?

A. About twenty-three miles from McCloud, I think.

The Court: East?

A. Yes.

Mr. Lichty: Q. Now when the quarry was abandoned, as shown by the last exhibit which I handed you, the picture depicts a rock wall all along the back of that quarry extending clear up to the grass roots, the dirt, a very small portion of overburden.

(Testimony of Homer G. Johnson.)

What was the quality of all of that rock that is exposed in that place there now?

A. It was practically all soft.

Q. All what? A. All soft. [25]

Q. Soft?

A. That is too soft for material surfacing and oil rock.

Q. Now when you abandoned that quarry and located rock some distance away and opened up a second quarry, had the Government engineer, Mr. Wood, refused permission to use more rock from this quarry?

A. Yes. He had practically condemned the whole thing to any farther use.

Q. Now when you attempted to produce rock from this second source, had Mr. Wood located this source for you?

A. No. He hadn't located any other source. He and I had looked around some, with the idea of trying to find another substitute quarry, and when he had practically condemned that, that was along about Thursday or Friday of—well, around Labor Day, as I remember it, or just after Labor Day. I didn't keep a diary so I have to go approximately on these dates. And so Hildeburn, him and I talked it over, and so Hildeburn said, "I think the only thing for Homer to do is to get on a train and go down to San Francisco and have it out with them down there as to what we are going to use for some more rock. There is no use wasting money around here and monkeying with this stuff." So

(Testimony of Homer G. Johnson.)

it was sort of agreed between all three of us that would be the thing for me to do, as the Resident Engineer didnt' have any particular authority in the thing and all he could do was tell them in San Francisco what the troubles were and those were the men down there that had the authority. [26]

Q. Well, what did you do?

A. What is that?

Q. What did you do?

A. Well, I went over to Mt. Shasta that evening and got a ticket and got on the train to go down to San Francisco. I went down to the District Office. I got down to San Francisco in the morning and I went up to the District Office along about—oh, I think the train got in at ten o'clock, I am not sure; anyway, I was up there in the forenoon, before noon, and I went to see Mr. Potter and he wasn't there in their office, and then I went in to see Mr. Brown and I talked to him a little about our difficulties, and so he said, well, I had better take it up with Mr. Potter but he didn't think Mr. Potter was in, thought he would be in Monday, however, and so I think he checked with the girl about what Mr. Potter's schedule was, and he said, "Well, I think Mr. Potter will be in all right Monday morning." So then I proceeded to plan on staying over Sunday in San Francisco, and so Monday morning I went down—I went up to the District Office from the hotel and I went and talked to Mr. Potter and I told him what our difficulty was, that we were just practically sunk as far as

(Testimony of Homer G. Johnson.)

any further operation was concerned, and he says, "Well," he said, "I think the thing for you to do," he says, "is to move on over to the gravel." He says, "You have got to do it anyway, and," he says, "the thing to do is to go now. I think you can operate enough cheaper over there to pay you to move now anyway, regardless of quarry." I said, [27] "Well, there is a lot of difference between cost of the haul." I said, "We are just barely up to the plant there with the material from the east end of the project and," I said, "it will take all that excess haul back towards the rock plant from the gravel plant. It is going to make the hauling cost a lot more." I says, "Who is going to stand that?" He says, "Well, we didn't guarantee how much rock you would get out of that quarry." And I said, "Well, I assumed that under those conditions, or under those specifications, why, the contractor could rely upon them", or something to that effect. Anyway, I said, "Well, we have got to solve this situation some way or another and," I said, "I want to know where I am at." And I said, "When are you coming up to the job?" And he said, well, he would be up in just a few days. And so, as I remember it, why, he arrived—that was Monday morning; I think he arrived about Thursday on the job, or within a few days afterward. I am not sure on the dates exactly on account of I didn't have them down.

Q. As a result of that trip what happened?

(Testimony of Homer G. Johnson.)

A. Well, Mr. Wood told me the day before, he says, "Potter will be along in the morning". I said, "Well, I want to be sure to see him while he is here," so I stayed in McCloud most of the time at night. Sometimes I would wait in the store there to take out things they might need around camp, or something, and I got around there I guess about ten o'clock, and when I got on the job [28] I run across Mr. Wood. He was in close to where the crusher was there in a rig that he drove, and I said, "Did Potter come?" He said, "Yes, he has been here and gone." I said, "By golly, what did he want to leave so quick for? I want to see him. I want to get this thing settled as to who is going to be holding the sack around here and what we are going to do to get this job done." And so—I am a little ahead of my story here now. In the meantime while I was in San Francisco, Mr. Hildeburn had decided to take a shovel and go prospecting for another source of the material, and so he went around to this other source up the creek near where his camp was and he located this source, and then while I was on the deal—when I came back from San Francisco they started up operating in this new source and this stuff turned out to be a little better than what they had condemned before out of the old quarry, and so the stuff looked passable and when Mr. Potter came along they looked along and they thought probably the stuff would be better, at least for a while anyway, and so that was the morning that I mentioned the meet-

(Testimony of Homer G. Johnson.)

ing, going out there and Mr. Potter had left. And so I said when I was talking to Mr. Wood about whether Mr. Potter—about—I was disappointed because Mr. Potter left and I hadn't had a chance to talk to him about who is going to pay some of that extra cost around there, and so Mr. Wood said, well he said Potter told him we had better keep track of what that extra cost was because he said I probably would have a claim and they would want to know [29] what I really had coming on that basis for that extra cost.

Q. Now when you opened up the second rock quarry, that was about how long a haul from that quarry to the crushing plant?

A. Well, I think the trucks had to make a circle and go farther of course than what the nearest——

Q. Airline?

A. ——route between the quarries would be, and I think the trucks made around six or seven hundred foot circle there; in other words, from one end, the farthest end of where they went to the farthest end where they would dump.

Q. It would be an eight or nine hundred foot round trip? A. Yes.

Q. You didn't remove your crushing plant up to the second quarry? A. No.

Q. You would load the material in the truck by the shovel, take it to the crushing plant, then load it into the crusher, then load it into trucks and distribute it along the road? A. Yes.

(Testimony of Homer G. Johnson.)

Q. Did that make a more costly operation than the dragline operation into the crusher?

A. Oh, yes. It cost much more to haul it. Then there were about three truck operations to haul it from there. In the quarry we were using a dragline most of the time and towards the last when we had time to look around and see whether there was anything good in the corner of the thing we used a truck in there. But [30] the new quarry used about three trucks all the time on account of the distance away.

Q. Now about when was it that you broke your last shaft in that crusher before you moved down to the gravel plant—gravel pit?

A. Well, it was along about the 17th or 18th of September. It was before the 20th.

Q. At that time had the rock in the second quarry which you had opened also begun to show soft?

A. Yes. We figured it was just about petered out and we didn't think there was very much more there and every time we got into that stuff where it was pretty soft, pretty poor, we would have to—those rolls would go bad. You could tell where the rock wasn't so good. Stuff would begin to build up on the rolls.

Q. Then you moved to the gravel pit and produced the rest of the material for this job?

A. Yes.

Q. How far had you completed the base course

(Testimony of Homer G. Johnson.)

from the east end of the job at the time you moved to the gravel pit?

A. Well, we had about, I think, about seven, six or seven miles, between six and seven miles, as I remember, completed.

Q. You were from a mile to two miles from the—— A. Center.

Q. ——center of the job? A. Uh huh.

Q. And you had produced no oil rock? [31]

A. No. We hadn't blocked out any oil rock, and that was where our greatest difficulty was. You see, we had started oiling, putting the prime coat of oil on the surface from the east end of the project and we had oiled clear up to the plant. That was about three-quarters of a mile, and we had some to oil a prime coat up west of the plant, then fully six or seven miles, six miles to where that was ready, either had the prime coat on or was ready for the prime coat, and of course we had no oil rock out and there was no way to put the seal coat on without—I mean without oil rock or rock to go on top of the seal coat. And we could not put that on and the road stayed there in that condition during the winter with just a prime coat on and all that road went to pieces that winter. The prime coat was all dissolved and the road petered out and had to be worked over again the next summer.

Q. Now did you complete your base course surfacing before the job shut down that fall?

(Testimony of Homer G. Johnson.)

A. Yes, we completed all the crushing, the base course and got out the oil rock, too.

Q. Had you spread your base course over the entire length of the project?

A. Yes, it had been spread over the whole thing.

Q. And had not the bad weather interrupted you you could have finished your oil rock course that fall, too?

A. Yes, we could have finished up. It would not have been so late. [32]

Q. You did crush all of the oil rock from the gravel pit that fall——

A. Yes.

Q. ——before you abandoned the operation?

A. Yes.

Q. Then when weather permitted the next spring about what date did you start in operating to do this work over again?

A. Well, a little before the 4th of July, I think about June 18th or 20th, somewheres along there.

Q. You received notice from the Bureau to proceed?

A. Yes. We put a grader in there maintaining the road some time before that. I think he was in there pretty near a month maintaining that road before we had notice to proceed with the oiling.

Q. Was the road being used by traffic?

A. Yes. The road was used all the time by the traffic. It was the only road through the country.

Q. And what had happened to the gutters and ditches during the winter?

A. Well, we had cleaned them all out the fall

(Testimony of Homer G. Johnson.)

before, and, in fact, I think, they were practically all finished, so the next year, or during the winter there was a lot of stuff sloughed off in the ditches that had to be taken out.

Q. Did the Government pay you extra for doing that the second time? A. No.

Q. You state that it was necessary to refinish the surfacing of [33] the prime cost?

A. What was that?

Q. It was costly to go over the surfacing again and make a prime coat on it before you applied your oil?

A. Yes. In other words, you see, this oil had all broken up and it left the original oiled surface all full of potholes, very rough. The only way to smooth that up and get it in shape for re-oiling was to rip it up with scarifiers from one end to the other even, work it hard and put the prime coat on again and be back where we were when we quit last fall.

Q. Now your pay for this job was by the unit or so much per ton of gravel in place, was it?

A. Yes.

Q. And for that work of reprocessing and refishing you received no extra or additional compensation? A. No.

Q. Did the Government extend the time of the completion of your contract by virtue of the difficulties you encountered in this quarry?

A. No.

(Testimony of Homer G. Johnson.)

Q. Did they penalize you for late completion?

A. Yes. There was quite a lot of penalty—sixteen hundred dollars, as I remember.

Q. Had the quarry approximately three-tenths of a mile right of Station 1239 to the first quarry that you opened and shot been an adequate [34] quarry for the production of the material required by this contract, would you have been able to have completed your contract within the time provided within the contract?

A. Yes, I think we would have got through all right. It would have been a close race to beat the bad weather, but we were able to produce around a thousand tons per day and we started right in on the 8th or 9th of August crushing on the road and we had good weather until the latter few days of September when there came a little rain, then it was nice and warm and hot there for a week or ten days afterwards until about the 10th day of October before it turned cold.

Q. When would your contract time have expired, according to the terms of the contract?

A. I don't remember that exact date.

Q. Well, could you find out during the noon hour and we will put it into the record later.

A. Yes.

Mr. Lichty: You may take the witness.

Cross Examination

By Mr. Langley:

Q. Mr. Johnson, that big book there, do you see a marker in it?

A. This one here?

(Testimony of Homer G. Johnson.)

Q. Yes. You see that marker there. Do you see some words that are underlined there on the other side? A. Uh huh. [35]

Q. Now what is that book?

Mr. Lichty: What is the book? Just answer the question.

A. Oh. This is General Specifications.

Mr. Langley: Q. You read those before you bid on the job, did you?

A. Yes. I am pretty familiar with them.

Q. Now read what it says there underlined.

A. It says, "Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

Q. I see. Now that other paper there, I mean the other paper lying there, Government's Exhibit, do you see that other paper that is lying there?

A. This one here?

Q. Yes. That is Government's Exhibit No. 22. Is that your signature at the end of it?

A. Yes.

Q. Yes. Now read the first question on the first page and the answer given to it, please. Better read it out loud.

A. "In what manner have you inspected this proposed work?" You mean you want me to read the question or the answer?

Q. Read the question and the answer. Yes.

(Testimony of Homer G. Johnson.)

A. "In what manner have you inspected this proposed work? [36] Explain in detail." I said I had checked it very carefully.

Q. So you went down there and looked over this site; is that correct? A. Yes.

Q. And it looked good to you, didn't it?

A. Yes, it looked like there was material there, the material would be all right and it looked like there was lots of it, and I couldn't—

Q. You knew just as much about it then as the Government's engineers, didn't you, when you started?

A. Well, in other words, I relied upon the specifications. That had sort of become a custom here for years amongst all the engineers of the country and all the different departments letting public works, that if they were going to furnish the sites, in other words, why, they generally had lots of time to select out these sites, while we never had time to go out there and core drill these quarries, and couldn't neither. Sometimes from the time we would get these plans to bid on these jobs and the day the bid would be opened might not be over one or two days and we would have no chance to make an investigation down inside of the ground. All we could do was to observe the top of the ground for what you could see in a reasonable—in the time available.

Q. You didn't ask the Government engineers whether they had made investigation in back of the rock, did you? [37]

(Testimony of Homer G. Johnson.)

A. No. They said the rock was available there, and of course we relied upon that.

Q. And it just was not humanly possible for anybody to see what was in back of the face of that site there, was it?

A. No, no. It was impossible for anyone to see in the ground there without taking some equipment in there and core drilling it, or something that way.

Q. And there was no evidence that the Government had done that, was there? A. No.

Q. How far did you say this so-called second face or second operation was from the first?

A. Well, we took it the trucks had to go about six hundred, around six or seven hundred feet.

Q. Now did you ever measure that?

A. Well, yes. I stepped it one time. I don't remember now just exactly what it was. The actual airline was a little nearer, but—

Q. Which way did you step it, by the airline or by the road?

A. No. I stepped it by the way the trucks went.

Q. By the road? A. Yes.

Q. How far did you step it off?

A. As I remember now, six or seven hundred feet.

Q. When did you arrive on the job down there to stay more or [38] less permanently? Did you say July 20th? Is that correct?

A. Well, somewheres around there; around July 20th, 25th, or somewheres along there.

(Testimony of Homer G. Johnson.)

Q. Now when did you first begin to produce rock?

A. It was about August 8th; somewhere along there, 8th or 9th. Maybe a little before that, on account of it took a day or two to get the material to the grade.

Q. That was about August 8th. And when did you receive notice to begin operations?

A. About June 8th.

Q. Two months later then you began to produce rock; is that correct?

A. Yes. There was lots of work there to get ready to produce rock.

Q. All right. Now your superintendent bore some coyote holes? That is the way you got into the quarry; isn't that correct? A. Yes.

Q. That is the way you got in there. Now when you got in there you saw some soft rock; is that correct? A. Yes.

Q. And immediately you became apprehensive of the quarry's situation? A. Yes.

Q. And then I understand you took it up with San Francisco at that time; is that correct? [39]

A. No. Hildeburn discovered this soft rock first when I was up here in Portland. Then he called me on it. Then they drilled another day or two, worked in the hole there and they extended it farther back. So then he called me and he said, "Well, Wood,"—he said, "I don't think this is going to be much good, this quarry, and Wood don't think so now either, and he isn't the material engineer."

(Testimony of Homer G. Johnson.)

He said, "I think you had better get on the train tonight and come down."

Q. What I am getting at is, the first conversation you had about this quarry. When was it and who was it with concerning the Government?

A. Well, it was somewheres around July—well, it was a few days after they started in there and I think they were drilling there on the 4th of July. I imagine it was around the 8th or 9th of July, somewheres along there.

Q. Now then, who did you have the conversation with, the Government man?

A. You mean who did I have the conversation with that represented the Government?

Q. Yes.

A. Why, when I went down there Mr. Wood had sent for Mr. Steele and he was there, and they came there that morning—

Q. How do you know Wood sent for Steele?

A. Hildeburn told me.

Q. You don't know though. When you got there Wood was there, and [40] then did Steele come?

A. Yes. I think they were all there together.

Q. That was about July 8th and that—

A. Well, that may have been a little bit—

Q. Well, anyway the date is not important. Before that Wood was saying the quarry was bad and ought to be condemned. Wasn't that right?

A. No. We didn't tell them what to do with the quarry. It was up to them. It was their quarry

(Testimony of Homer G. Johnson.)

and it was up to them to do what they pleased with it.

Q. It was your quarry. You were working in it.

A. Yes. However, if they wanted us to use that rock we would get it for them. If they didn't, we would do something else.

Q. What was your position about the quarry the first time you talked to Mr. Wood, or Mr. Steele? Did you think the quarry was all right or did you think it was bad?

A. Well, we all had considerable discussion about it.

Q. I am asking you what you thought, what you told them.

A. Well, I don't remember now exactly what I said, but I sort of concurred in the idea that we could probably operate in it so as to get the material so it would be apparently uniform and not get a lot of bad material at one time and good material another time, and so forth.

Q. So you didn't complain about it then at all?

A. Well, no, not right from the general operation as far as the [41] contract was concerned.

Q. Now when was the first time that you complained about this quarry?

A. Well, along after we started operating a couple of weeks, then of course we began to have a lot of trouble and delay. It was just a constant delay all the time. The engineers would take a few loads and then—

(Testimony of Homer G. Johnson.)

Q. Just answer my question. Can you tell me when you first complained to the Government engineers that this quarry was not what you expected?

A. Well, I think that, in other words, we were all very much surprised to strike soft rock in this at that time, and I think I told them then, and Mr. Hildeburn had told them.

Q. Now that was July 8th then— A. Yes.

Q. —that you told them that in your estimation the quarry was defective because of the soft rock; is that correct?

A. Well, I can't say that I went out and definitely told them that. In other words, we had more or less a conference amongst us. We had all come to that conclusion, that the rock was not going to be what we had thought it was.

Q. Who came to that conclusion?

A. I think all of us.

Q. Well, who was "all of us"?

A. Mr. Wood, Mr. Steele and Mr. Hildeburn and myself. [42]

Q. You told us on direct examination that Steele wasn't there, that he had left before you got there?

A. No, no. Mr. Steele was there when that—

The Court: Potter.

Mr. Langley: Was that Potter?

Mr. Lichty: Potter is the one he said.

Mr. Langley: Q. Then on July 8th, that was the first time there was any discussion about defective soft rock in the quarry; is that correct?

A. Yes, when I was present.

(Testimony of Homer G. Johnson.)

Q: And the Government engineers told you to go ahead; is that correct? A. Yes.

Q. They told you to go ahead?

A. They decided that.

Q. Yes. That is what I want to get at. In other words, you were apprehensive about it, were not sure whether you should go ahead or not, and they came up there and, according to you, they ordered you to go ahead; is that correct? A. Yes.

Q. That is right; and at that time you had some question in your mind about whether their direction was the proper thing or not, didn't you? I mean, you were not in complete agreement with them that you ought to go ahead, were you?

A. No. We didn't think it would be too difficult from our stand- [43] point and it was a matter for them to decide whether—we were not trying to insist that they take a lot of bum material and make a road out of it. That was really an engineer's problem to settle.

Q. So you were satisfied with their so-called ruling at that time that you go ahead with the quarry; is that correct?

A. Well, yes. There was nothing else that we could do.

Q. Now, Mr. Johnson, did you ever read your contract? Show the witness Article XV of the contract.

Mr. Lichty: If the Court please—do you offer that in evidence?

(Testimony of Homer G. Johnson.)

Mr. Langley: All right. Do you have any objection?

Mr. Lichty: No objection. What pre-trial number is that? Will you hand it to the reporter, please, so he will have in his notes what that is.

The Court: It is admitted. It may be marked. What number is it, Mr. Person?

The Reporter: Defendant's Pre-Trial No. 5.

(The photostatic copy of Bid, Contract and Bond for Forest Road Construction, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 5, was further marked "and trial".)

Mr. Langley: Q. I will ask you to read Article 15 of the contract, Mr. Johnson, please. [44]

A. "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Q. So you did have a remedy then, if you wanted to avail yourself of it?

Mr. Lichty: We object to that as argumentative, your Honor. That is a question that belongs to this Court, not for the witness to determine or counsel.

(Testimony of Homer G. Johnson.)

The Court: He may answer that. He asked you why you didn't follow that course.

Mr. Lichty: No, he didn't ask him that. I would like the question read.

Mr. Langley: Q. Well, I will ask you that. Why didn't you follow that provision of the contract?

A. Well, it didn't particularly concern us. In other words, if they wanted that we didn't care so much. If it was mud they wanted, why we would give it to them. See? We were not particularly concerned in whether the rock was hard, soft or intermediate, or how it was, or whether it was clay they wanted. If they wanted that we would give it to them. We didn't think there [45] was any question but what we could probably crush this stuff and put it through the plant. So it was a question for **them** to decide whether they wanted this material or not. It wasn't our question; it was their question. I mean, it wasn't our problem; it was their problem.

Q. Now when is the first time you went to San Francisco about this quarry?

A. Well, as I remember, it was right around Labor Day; I think a few days after Labor Day.

Q. And who did you talk with there?

A. Well, I went up to see Mr. Potter, because I knew he was handling the job from the District Office, and he wasn't in, and so then I thought I would go in and talk with Mr. Brown a little bit, and I told him the difficulty and he suggested I take it up with Mr. Potter, which, of course, was the proper

(Testimony of Homer G. Johnson.)

place to start with. And so I think he said Mr. Potter wasn't in and wouldn't be in until Monday, but he picked up the telephone and asked the girl if she knew what Mr. Potter's schedule was, and I think he said, "That is right. He won't be in until Monday morning."

Q. This is the Mr. Brown you talked to?

A. Yes.

Q. The gentleman sitting here? A. Yes.

Q. Did you talk to anybody then in San Francisco on that trip about the quarry? [46]

A. Well, I don't remember just what conversation I had with Mr. Brown, but I do remember the conversation I had with Mr. Potter on Monday morning, and that is I told him that the thing was just practically hopeless and that we would have to—that something else would have to be done, and he said, "Well," he said, "the thing for you to do is to move over in the gravel."

Q. Now, so he ordered you to continue to work up there; is that correct?

A. No, he didn't order me to continue to work. That would be presumed, that I would have to keep working to meet the contract.

Q. Well, you had a conversation with him about the quarry? Your idea was that the quarry wasn't suitable, and what did he tell you to do about it?

A. Well, he told me the thing he thought I ought to do was to move over in the gravel. He said, "You have got to move anyway. The better headway over

(Testimony of Homer G. Johnson.)

there will offset the difference in cost", or something of that sort.

Q. Did you object to the suggestion?

A. Yes. I said, "That might be all right but who is going to pay for all that expense, like the haul-back to the other plant, and all of that, the dividing line, and so forth?"

Q. Did you follow Article 15 and make an appeal from the ruling of Mr. Potter on that score?

A. No.

Mr. Lichty: We admit that there was no appeal made from any [47]] ruling at any time. Now if that is what you want you have got it in blanket.

Mr. Langley: Q. Your whole contention here, Mr. Johnson, is that this quarry was not suitable to produce rock; is that correct?

A. Now, not only not suitable but it was not what—in other words, our main contention is that they didn't take the stuff.

B. Because it did not meet contract specifications; is that correct?

A. Well, in other words they just refused to take their material.

Q. Well, now then, there must be one of two reasons for that. Either your method of operation was faulty or the quarry was not good. Now which is it?

A. Well, the quarry wasn't good.

Q. All right. So, then, your contention all the way along is that this quarry was not good; is that correct?

A. Yes.

(Testimony of Homer G. Johnson.)

Q. And the Government's contention was that the quarry was good; that is correct, isn't it?

A. What is that?

Q. And the Government's contention all the way along was that the quarry was all right?

A. Yes, I think that is part of their contention.

Q. And this was the quarry that was mentioned as three-tenths of a mile right of Station 1239 under the contract, wasn't it? [48]

A. Yes.

Q. In other words, this was a question arising under your contract as to whether or not this particular spot that you began operations was a fit quarry; isn't that correct?

Mr. Lichty: I object to that again as argumentative.

Mr. Langley: Q. Isn't that your position?

Mr. Lichty: I object to that as argumentative.

The Court: He may answer.

The Witness: I didn't get the question.

The Court: We will take the noon recess now.

When do you want to start in again?

Mr. Lichty: At your Honor's convenience.

The Court: When do you want to start in?

Mr. Langley: Well, one o'clock. I think we will have to hurry if we are going to finish today.

Mr. Lichty: We won't finish today. There is not a chance.

The Court: Well, we will start at 1:30. You will have to allow yourself two days.

(Testimony of Homer G. Johnson.)

Mr. Langley: Before we adjourn I might say this in all fairness to everybody. There is a recent case decided by the United States Supreme Court, decided April 10th, 1944, entitled United States vs. Algernon Blair, which, in my opinion, is absolutely controlling in this case.

Mr. Lichty: United States versus whom?

Mr. Langley: Algernon Blair. It is the first time the Supreme [49] Court has really considered this Article 15 of the contract I am just talking about in my examination here, and I think it absolutely controls this case.

The Court: What is the date of the decision?

Mr. Langley: April 10th. Now I don't know whether you have it in your office.

The Court: I don't either at this moment. How do you keep so close up on the Supreme Court's opinions?

Mr. Lichty: I will tell you, these Government engineers always have their ears to the last decision as to any of their contracts and they know it before it is out of the court.

(Thereupon, at 12:00 o'clock noon a recess was taken until 1:30 o'clock P. M. of this day, Tuesday, April 18, 1944, at which time Court reconvened and the following further proceedings were had herein:)

The Court: Proceed.

(Testimony of Homer G. Johnson.)

Homer G. Johnson, the plaintiff, resumed the stand as a witness on his own behalf and further testified as follows:

Cross Examination (continued)

By Mr. Langley:

Q. Mr. Johnson, this I have here is plan and equipment questionnaire. It is Plaintiff's Exhibit No. 22, and on the last page there are some items of equipment, and you state the present [50] location of them. Now I think you can answer this without any showing. The exhibit says that these things were in Portland, Oregon. Where were they in Portland, Oregon, do you recall?

A. Well, my warehouse is over on Greeley Avenue, and most of the stuff was over there.

Q. Stored over there, was it?

A. Well, stuff comes in and out all the time. It is around there.

Q. Now then this 15 by 36 jaw crusher you stated was in Portland. Was it in Portland or was it out on a job?

A. No. That was in Portland.

Q. And this three foot cone crusher; was that in Portland or was that out on the job?

A. Well, I think that one was here, as near as I remember.

Q. And this 20 by 40 Pioneer Roll Crusher, was that in Portland?

A. Yes, that was in Portland.

Q. And this air compressor, was that in Portland?

(Testimony of Homer G. Johnson.)

A. Yes, I think that was—I have almost forgot where that was at, but I think it was here. That was a belt-driven compressor we had down there and we were doing some work about the time that work was awarded. We were finishing a job over in Washington and we had two little portable compressors over there and they were rented.

Q. You say about the time you were starting this job you had a job in Washington?

A. Well, about the time the job was bid. It was finished shortly after that. [51]

Q. Where was the job in Washington?

A. Over near Chehalis.

Q. What was the name of the superintendent on the job?

A. Well, I think my brother was the superintendent. His name was Holly Johnson.

Q. Was it a job with the State of Washington?

A. Yes, that was with the State of Washington.

Q. Do you remember the name of the man you had contact with that represented the State of Washington on that job?

A. You mean—who do you mean, Resident or District engineer, or who?

Q. Well, just the name of any of the Washington men that represented the Washington State Commission on this job that you were working on over there.

A. Well, E. C. Simpson, of Vancouver, was the District Engineer.

(Testimony of Homer G. Johnson.)

Q. I see. And when did you finish that job, do you remember?

A. Well, I think it was finished in the early days of July; somewhere along there.

Q. This Austin No. 77 Diesel Motor Patrol, was that in Portland?

A. Well, I don't know. I have got quite a few motor graders. At that time I think we had four or five and I don't remember now just which grader it was—which exactly. They switch around.

Q. How about the five yard trucks that you list on this as being in Portland? Were they in Portland.

A. Well, I had the trucks here, yes. And Mr. Thomas, who does [52] a lot of trucking, he had trucks here and he was trucking up on that job also and he had trucks up there, so I don't know just where all the equipment was.

Q. Well now, Mr. Johnson, isn't it a fact that the reason you didn't get started on this job in California was that you hadn't finished the job up at Chehalis?

A. No. That had nothing much to do with that job down there, because my brother was the superintendent up there and Mr. Hildeburn was going to be superintendent in California and there was going to be two different distinct outfits, so—

Q. When did you get your equipment down on your California job?

A. Well, the compressor went down there right after Mr. Hildeburn went down there on the last

(Testimony of Homer G. Johnson.)

days of June. Of course that was the first thing to have there, because you couldn't do very much until after the quarry was shot on account of having to put the plant out in front of the quarry and if you shot the quarry there and have the plant in the way they are liable to shoot the plant all to pieces, which frequently is done.

Q. Do you remember when your Austin No. 77 Diesel motor grader got down there?

A. Well, I don't know. However, that wasn't in there until after the crushing plant was running, all ready to run, so that—

Q. When did you crushers get down there?

A. Well, they got down there sometime in July, in the early days—in the middle of July, somewhere around there. [53]

Q. Do you remember the date, the approximate date?

A. Well, don't remember exactly in particular. There were several truck loads of stuff, and, as I remember, we shipped some stuff on the railroad, and of course we sent the things as they were needed and some things that were not going to be needed until the last they didn't go until the last, and things that were needed to start with were sent. In other words, as the things were needed we got them out without delay.

Mr. Langley: That is all I have.

Redirect Examination

By Mr. Lichty:

Q. Mr. Johnson, counsel interrogated you quite closely this morning on whether or not you had any

(Testimony of Homer G. Johnson.)

arguments with the District Engineer or the Resident Engineer there, rather, on the quality of the rock in that quarry. Had the rock in that quarry all been of the same character as the exterior, hard, brittle rock, would your cost of doing this job have been less or greater than it was with the soft rock you encountered?

A. Oh, it would have been much less except it was—in other words, the harder the rock that was there the better it would crush.

Q. How about the time of performing the job? Would that have been materially lessened?

A. Well, certainly the more yards you get through every day the more quickly you are going to get done. [54]

Q. You never did think, did you, that the material you were actually putting on that road was up to specifications? A. No, we never did.

Q. There was too much soft material in it always?

A. Yes; in other words, to make a good road and to be good crushings. Now in some quarries we have encountered in years of operation, where you strike soft rock conditions would be altogether different. You probably would crush it faster. But that stuff, as you struck that soft rock it would ball up on this roll crusher and wouldn't go through nearly so fast, and it would damage that roll and break the roll, and we had on these breakdowns much delay, of course, two to three days or four days every time it happened. In some quarries that

(Testimony of Homer G. Johnson.)

we have run across soft rock in the softer it is the best it goes through.

Q. In other words, if it is not flint?

A. How is that?

Q. I say, flint would be harder to crush than medium hard rock?

A. Well, it all depends on the rock. Sometimes the hard rock is more brittle and will go through freer than a softer tough rock.

Recross Examination

By Mr. Langley:

Q. Did you ever tell the people in San Francisco that you didn't think this rock was up to the contract specifications?

A. Well, I told them the same effect to that.

[55]

Q. You are interested in doing a good job always, aren't you?

A. Well, yes. We try to have them pleased. Of course, they are not pleased unless they do get a good job.

Q. And so this man Wood down there in the South Pacific fighting is not up here. You know he would not allow you to put that on there if it was not up to the contract specifications?

Mr. Lichty: Where is Mr. Wood, you say?

Mr. Langley: In the South Pacific.

Mr. Lichty: Fighting?

Mr. Langley: Yes. Isn't that right?

Mr. Lichty: Carrying a flag, is he?

(Testimony of Homer G. Johnson.)

A. Well, that is why he had his superiors come up there and take a look at it in order to pass on it. He was done and that is why he sent for them.

Mr. Langley: Q. But you never told his superiors that you didn't think this material was meeting the contract specifications, did you?

A. Well, I went down to see Mr. Potter there when I made that special trip to San Francisco. I told him, well we couldn't use it and the stuff wasn't any good and blamed Wood for not taking it, and we had just—the quarry had just played out and there was no chance to do anything farther there.

Mr. Langley: That is all.

Mr. Lichty: That is all.

(Witness excused.) [56]

Mr. Lichty: Call Mr. Hildeburn.

HARRY HILDEBURN

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. What is your name?

A. Harry Hildeburn.

Q. H-i-l-d-e-b-u-r-n?

A. That is right.

Q. Mr. Hildeburn, were you the superintendent

(Testimony of Harry Hildeburn.)

for Mr. Johnson on that job that is in question here? A. Yes.

Q. Mr. Hildeburn, when did you first meet Mr. Wood, the Resident Engineer on that job?

A. The time that Mr. Johnson and Mr. Thomas and myself went down to look at the job the first time.

Q. You stayed down there just that one day, did you? A. That is right.

Q. You returned to Portland, and then when did you return to the job?

A. Well, approximately a week later.

Q. What equipment did you take down with you at that time?

A. Well, I don't know as I took it with me. It was shipped so it [57] would arrive there about the time I did.

Q. That is what I am referring to.

A. It was a compressor and drills and small tools of all kinds.

Q. Now on a job of that character what is the first work to be done?

A. Well, to clean up the face of the quarry and any place where we were going to put a coyote hole in, use that method of shooting, put in the coyote hole and get it ready for the shot.

Q. Did you take men with you? A. Yes.

Q. For the purpose of doing that?

A. Yes. I might add, outside of the equipment that we took down I immediately made arrangements for a hired shovel that we rented for a few

(Testimony of Harry Hildeburn.)

days to come in there and clean up the tailing that was sliding in front of the quarry so we could actually get out the hard rock face. But that was not our equipment. That was a rented piece of equipment.

Q. Was Mr. Wood present when you got back on the job? A. He was on the job, yes.

Q. Was he present when you started your coyoting operation?

A. Well, the first thing I did when I landed there was to look up Mr. Wood and I believe we rode over the entire job together and saw all of the job.

Q. You visited the site of this quarry?

A. Yes. [58]

Q. And he pointed this out as the quarry?

A. Yes.

Q. Did he ever make any objection to your manner of drilling this quarry? A. No.

Q. Now just tell the Court what happened, what you discovered in the coyoting operation.

A. Well, to begin with, this quarry was a very fine looking quarry. From the contractor's point of view it was a beautiful quarry. The rock was reasonably small, well laminated and brittle. You would hit a piece of it, it would ring like a bell, denoting that it was hard; and, as I say, it looked like very nice crushing material; and, in fact, we were very much pleased with the quarry. Then we started this coyote hole and got in about approxi-

(Testimony of Harry Hildeburn.)

mately thirty feet when the coyote man, the powder man, complained about his drills plugging up, but I didn't take that seriously because I thought it was just a little dirt seams, or something clogging his drill up, and then we got in about, oh, somewhere past forty feet when he told me one day——

Mr. Langley: Now, just a minute. I am sorry, but I will have to ask you just to tell what you know.

The Witness: Well, I know this.

Mr. Langley: Well, you said he told you.

The Court: That is how he learned it. Then he went and looked for himself. [59]

Mr. Langley: All right, if you looked for yourself that is fine, but please don't say what somebody else told you unless you checked it up yourself.

The Witness: Yes. We got in about forty feet and this powder man came to me and was bragging about how much coyote hole he made that day. He told me that he had gone about thirty feet in that day, and I knew that that was impossible for a man to go in thirty feet on a coyote hole in one day, so I told him he was mistaken. "Well," he said, "go measure it for yourself."

Mr. Langley: Now can't we keep out this other man's conversation?

The Court: Well, it doesn't matter. He was bragging about his footage.

A. (Continuing) Well, in the end I went inside of the coyote hole myself. A coyote hole is small and you have to crawl in. You don't go in any

(Testimony of Harry Hildeburn.)

faster than you have to. But anyway I went in to check up on the footage he claimed, and he had actually made this footage, and then I commenced to suspect that something was wrong, so I questioned him about his drilling and why he was making such good progress, and he said, "Well, that stuff is easy to drill. I can just push a drill right into it." He says, "It is getting awful soft." So then I went in with him and watched him drill it. We were drilling with a jackhammer, and ordinarily it will take several minutes to drill a jackhammer hole approximately two and a half or three feet deep. In that rock he would go in [60] there in the matter of a few seconds. He would just walk right in. And then we got to investigating the rock and found that this rock was very, very soft back there, and we sampled it and it just gradually was getting softer from about thirty feet in; you could notice it getting softer from a point about thirty feet from the face until back where he was. However, it seemed to reach its peak of softness at about,—oh, in the neighborhood of fifty feet. I don't know as it ever got any softer from fifty feet on, but it was very soft at that point, and I was very much perturbed about the softness of this rock and I immediately went over and got Mr. Wood and he come over and he was also disappointed in the rock and he told me that he would get in touch with the higher authorities in San Francisco, which I presume that he did.

(Testimony of Harry Hildeburn.)

Mr. Langley: Now let's stop that presuming stuff.

Mr. Lichty: Q. Well, he said that he would get in touch with the higher authorities?

A. Yes.

Q. What happened after he told you that?

A. Well, the reason I presumed was the higher authorities showed up on the job within a couple of days after that.

Q. Did they go into the coyote hole and look this over? A. Yes.

Q. Who were they, do you know?

A. The gentleman sitting on the left—I just can't recall his name at this moment—was one of them. [61]

Q. What is his name? Mr. Steele?

A. Mr. Steele. That is right.

Q. Well, after they had examined the coyoting operation, what did they tell you about proceeding with the work there?

A. Well, they come to the conclusion that——

Q. What did they tell you?

A. They told me they thought we could get enough rock out of there if the soft rock was properly mixed with the hard rock.

Q. Did you then put your cross-shafts in?

A. Yes.

Q. To prepare to shoot? A. Yes.

Q. And you did shoot?

A. And we did shoot.

(Testimony of Harry Hildeburn.)

Q. Now explain to the Court what happened during your pouring operation there, and crushing, and relative to encountering soft material and the difficulty with it.

A. Well, after the quarry was shot we started in erecting the plant. Well, we got done a little work on the plant previous to shooting the quarry, but not too much on account of the possibility of shooting the plant down, but we had our foundations in and lumber on the job, and I think—I believe we had the bunker up previous to the time we shot the quarry but we hadn't put in any crushers because our crusher was going to sit directly in front of the quarry, and belt conveyors carrying the rock from the crusher up into the [62] bunkers, and of course that could be very easily shot down if it happened to blow out at all. But, however, we shot the quarry and it didn't blow out and it would have been perfectly safe had we had our plant up because it was a nice shot. It raised the entire hillside up there three or four feet and dropped it right back again. A man could have been standing any place except right on top of it and been perfectly safe. So it was a very satisfactory shot. It didn't blow out.

Q. It didnt' blow out any hole? A. No.

Q. You then got your crusher and conveyors in position and started to operate?

A. We then put in our dragline and started to operate and everything was fine and running along in good shape for—well, I don't just recollect how

(Testimony of Harry Hildeburn.)

many days but for several days. Of course, in the meantime we had the little bugs to take out of our plant. A belt would run crooked here and little trivial things of that kind, you know, that had to be taken care of. But I would say that we ran along for four or five days up to a week before we actually encountered some of this soft rock and at that time we moved the dragline over. Now I don't know whether we moved on our own account or whether I was requested to move by Mr. Wood, but after we got down in the trench, oh, a matter of ten or twelve feet, we did move and just moved our tail holt every time the dragline bucket dug a new trench. [63]

Q. Moved what over?

A. The dragline bucket.

Q. When you moved your tail hold?

A. Tail holt, that's h-o-l-t, yes. That is the tail that brings the bucket back and forth, you see.

Q. That is spelled h-o-l-d, isn't it?

A. Yes, that is right. Then we worked our way entirely across the quarry, but from time to time we would be stopped on account of hitting soft rock and we would get a little too far down in the trench. Mr. Wood would stop us. Sometimes we were only stopped for five minutes, other times we would be stopped for a couple of hours, and many times we would be stopped at the scales with a load of rock and the checkers and weighers with scales would get up on the load of rock and look at it,

(Testimony of Harry Hildeburn.)

and then you see if a load of rock came in there that didn't happen to weigh up to standard, if there happened to be a few hundred pounds light they would be suspicious that there was some bad rock in it and they would commence digging around in the rock. Of course that smaller weight would be a smaller load. We did try to keep our loads uniform and they would run within a few hundred pounds of each other as a general proposition.

Q. Were there many occasions where you had loads that had to be dumped or rejected?

A. Quite a number. Quite a number.

Q. Now were you able to produce any oil rock during your run at [64] that quarry? A. No.

Q. Give the Court the reason for that.

A. Well, it would have been impossible to have produced oil rock from it because there was a lot of this soft rock coming in at all times. The bucket would pick up a little soft rock occasionally in the bottom of the trench, and then in the back of the quarry that soft rock run higher up. This quarry face was approximately about, oh, twenty-five to thirty feet high right at the face from the level flat around the creek and then it gradually increased in height to a height of about, I would say about twelve percent grade, from there to the back of the quarry. From the top of the front face back it increased in grade but toward the back the rock was not so good, even on top of the ground.

Mr. Lichty: May I have the pictures that are in evidence here. Will you hand him this picture.

(Testimony of Harry Hildeburn.)

Q. Will you read me the number of that exhibit. It says Pre-Trial Exhibit number what?

A. Number 1.

Q. Number 1. Examining Plaintiff's Pre-Trial Exhibit No. 1, does that represent the back of the quarry where you say the soft rock was?

A. The left-hand side of the quarry. The right-hand side of the picture would probably be the back of the quarry, the extreme right-hand side, but I—— [65]

Q. That back wall that you see in there, is that typical of the rock you encountered on the back edge?

A. Yes, I think it would be. I think that is right.

Q. Was that rock along there in your opinion proper rock for road-making purposes?

A. Well, I think there would be a little good rock in that where it actually shows up in the picture. You can see a little good rock there yourself. But you can see right back of that good rock it showing up in the form of mud, and there is no indication in this picture that it is rock at all, but there seems to be a space there ten or twelve feet wide that looks as though it was pretty good rock.

Q. About ten or twelve feet wide?

A. But you couldn't tell from this picture whether it was good or bad. I wouldn't attempt to say.

(Testimony of Harry Hildeburn.)

Q. You know from your experience there when you left that quarry. Was the material along the vault of the quarry to the point where you had excavated it satisfactory material for crushing and road-making?

A. Well, we left a little point of good rock in that quarry. That was true right back of the bunker, because we couldn't shoot it on account of the bunker. The bunker was right against the face—not right against it but too close to it to make it possible to shoot it with any degree of safety.

Q. There was a little good rock? [66]

A. There was a little good rock, yes, because we had set our bunkers right alongside of the face on the left-hand side. But, oh, I don't believe there was over a thousand yards at the very outside of good rock that was left.

Q. Mr. Hildeburn, how long have you been engaged in contracting operations in the States of Oregon, Washington and California?

A. Since 1912.

Q. Have you been a contractor in your own right at times during that period?

A. From 1914 until 1926 I was contracting for myself.

Q. Then you, either as contractor or superintendent, built and constructed similar projects to this in which you were engaged?

A. Well, similar except in the processing on the road. That was our first experience of that

(Testimony of Harry Hildeburn.)

particular method of putting the rock on the road. Otherwise, yes.

Q. Would you say that this quarry in which you worked for Mr. Johnson was an adequate, satisfactory quarry for that job?

A. To begin with, yes. It had all the earmarks of being a beautiful quarry.

Q. But as it actually developed would you say it was an adequate, satisfactory quarry?

A. Oh, absolutely not.

Q. In your opinion did the failure of the material in that quarry to be adequate and satisfactory result in loss and damage to the contractor? [67]

A. Very much so.

Mr. Lichty: You may take the witness.

The Court: About how much in damages, Mr. Lichty, are you going to claim in the event liability is found?

Mr. Lichty: Sir?

The Court: About how much in damages do you expect to claim in the event liability is found?

Mr. Lichty: We will claim just within the statutory amount of this court, your Honor. We will claim \$9,999.99, or the equivalent thereof. The claim that was presented was for more than that—that he presented to the Government at the end.

The Court: Was your claim rejected entirely?

Mr. Lichty: Yes, entirely rejected. Do you have any questions?

Mr. Langley: Well, I am just wondering about

(Testimony of Harry Hildeburn.)

that point there. Well, I guess that is all right for the time being.

Cross Examination

Mr. Langley:

Q. Well now, can you recollect how many times the plant was down because of bad rock?

A. Oh, no, I couldn't recall that but it was down, oh, this would be purely a guess but I would say probably fifty or seventy-five times.

Q. Can you estimate it in number of hours, or anything like that?

A. No, I wouldn't make an attempt to estimate it in hours. Sometimes it would only be down for five minutes. [68]

Q. Can you estimate it in days lost?

A. Well, there was times when it would be down two and three days I believe at a time.

Q. You haven't any definite idea, then, about how many days it was down?

A. No, I wouldn't try to estimate that. That has been seven years ago.

Q. Yes. And you didn't keep any memorandum at the time? A. No.

Q. And just your own recollection is what you are relying on? A. That is all.

The Court: How does this case happen to be brought to a head so late? Seven years ago this all occurred.

Mr. Langley: Yes.

(Testimony of Harry Hildeburn.)

Mr. Lichty: Well, it was brought within the six-year period.

Mr. Langley: Of course, that is one of our claims on this witness being away. Of course he had lots of time to bring it while he was here.

Mr. Lichty: The point is that Mr. Johnson made his claim and was trying to get some action on it and had attorneys in Seattle, who kicked it around awhile, and just when he saw that he was really going to need some action he brought the claims to me. That is the actual fact.

The Court: The matter has been pending for a long while?

Mr. Lichty: Yes. [69]

Mr. Langley: I think that is not accurate, because we turned the claim down. June 15th, 1939, the claim was turned down.

The Court: Yes.

Mr. Langley: Q. Well, was the operation ever covered up by a slide there?

A. Well, no, not the operation. The only slide that it would be possible to have would be a Bagley digging a deep narrow trench and possibly the side of the trench might slide in, or something of that kind, but no sliding of any consequence. That quite often happens with a dragline operation.

Q. Do you remember whether any slides closed the plant down, then?

A. Well, as I say, the possibility of a little slide of that kind that might close the plant down for an hour, or bury our bucket, you see. Suppose

(Testimony of Harry Hildeburn.)

you were coming along digging a trench eight or ten feet wide, eight or ten feet deep, those walls stand pretty high, pretty straight. One of them might cave in on top of the bucket and possibly we might have to use some other method of uncovering that bucket, or something of that kind, which might take an hour or such a matter. That quite often happens in a dragline operation.

Q. There wasn't any trouble with 870? The trouble was all up there at 1239; that is right, isn't it? A. Yes.

Q. That is where all the trouble was?

A. Yes, that is where all the trouble was. [70]

Q. And the trouble there was that from your operation you couldn't meet contract specifications? That is correct, isn't it?

A. Well, we could meet contract specifications as long as our rock held out. Of course, there are many things that enter into meeting contract specifications. It would be a question of quality of rock, a question of grading. We always have just a little difficulty on grading because they call for certain percentages of fines, and one thing and another, and we did have a little difficulty in meeting those fine requirements, I believe, right off of the bat when we first opened the quarry. But that is to be expected, and——

Q. Well, you——

A. Well, let me add, if I may, but that was one of the reasons—that quarry being bad was one of the reasons we couldn't meet the requirements more

(Testimony of Harry Hildeburn.)

easily. Had we been able to make oil rock there we would have robbed out some of the larger sizes which would go into oil rock and that in turn would have increased our finer sizes which we had difficulty in making.

Q. Did you ever try to produce oil rock there?

A. No.

Q. Never even tried?

A. No, we didn't try because we were, right off of the bat we were told it would not be satisfactory for oil rock.

Q. Who told you?

A. Somebody in authority. [71]

Q. Well, who was it?

A. Wood. Wood, for instance.

Q. Well, who else told you?

A. Well, Mr. Steele.

Q. Do you remember the date Mr. Steele was there and told you that?

A. Well, I remember the day but not the date.

The Court: What is oil rock?

A. Oil rock is small rock from a quarter inch to a half inch that is very clean, with no fines in it, that is spread over the top of oil after the oil has been spread on the base. Then you spread this with a spreader box, a very thin coat of it, and that covers the oil and keeps the oil from sticking to the traffic.

Mr. Langley: I can clear that up.

Q. How many kinds of rock were you to produce under this contract? A. Two.

(Testimony of Harry Hildeburn.)

Q. What did they call it?

A. Well, different contracts call it different things but——

Q. Under this contract?

A. Well, I think this was—the first course was called the cover course. I believe that is right.

Q. Is that the same as “crusher”? That is the heavy stuff?

A. Yes, that would be the heavy stuff.

Q. Than the cover material or chips, that is the fine stuff?

A. That is the oil rock. [72]

Q. You mix that with oil and put it on?

A. No, you don't mix it with oil. The oil was spread on the road and then the truck backs up and spreads the chips over the top of it.

Q. Did you keep any production records as to how much you were producing there?

A. Well, no, I don't believe so.

Q. When you moved from the so-called first face to the second face do you know how much crusher run you had produced when you made the move?

A. Over the first face, or under, or in comparison with the two faces?

Q. Yes. At the first face how much had you produced?

A. I don't recall just what we were producing. Somewhere in the neighborhood of a thousand tons a day. I mean by a day in three shifts. Somewhere in that neighborhood.

(Testimony of Harry Hildeburn.)

The Court: Why couldn't you get oil rock out of this quarry?

A. Because this rotten rock would come in and contaminate the good rock, and of course if any of that got into the oil rock it would ruin it.

The Court: Why? How would it ruin it?

A. Well, in other words, we will call this rotten rock a piece of clay, and if you put a piece of clay in your oil rock and it is spread on top of the oil and then your roller comes along and rolls that into the oil, why, your roller would immediately [73] mash this rotten rock; then you would have a space there of an inch or two inches that would be nothing but a clay spot and would immediately fade out under the traffic.

The Court: It has to be uniform and hard?

A. It has to be uniform and good rock. It is the best rock we can produce to qualify as oil rock.

Mr. Langley: But you didn't try to produce any? There was no test ever run on any? Is that correct?

A. Oh, no. No, no. From experience we knew we could not produce it.

Q. You were relying upon your own judgment, then, to some extent, weren't you?

A. No. I testified a while ago I was told we would not be allowed to use that for oil rock.

Mr. Langley: That is all, your Honor.

Redirect Examination

By Mr. Lichty:

Q. Mr. Hildeburn, one question or two. There

(Testimony of Harry Hildeburn.)

were delays occasioned, I believe, by the breaking of the roll shafts of the crusher. What would occasion that breakage?

A. Well, we broke four shafts during the operation, and the reason that we broke them, why—well, it is my belief that the reason that we broke them, at least, is that this dead sticky material would build up on the rolls, and you see when a roll's crusher crushes rock the rock is riddled and it is broken [74] into fragments and gravity drops it away and the rolls clean themselves, but when this sticky material would come in it would mash all right and stick to the rolls and build up and build up until the safety factor in the rolls, which is a very enormous spring, would spread out until there was no safety factor left and then you had two immovable objects there coming with great power and there was no chance for any safety factor and it would lock these shafts and break them.

Q. Did you ever have any experience in shafts of a roll crusher breaking before?

A. I never heard of a roller shaft ever breaking before and none in my experience on any job.

Q. Have you ever observed any roll shafts break since then?

A. We have crushed in the neighborhood of three million yards of rock in the last three years with roll crushers and we never have broken a shaft.

Q. Now counsel keeps speaking of face number two and face number one. Did you folks ever con-

(Testimony of Harry Hildeburn.)

sider the second quarry you opened as another face of the same quarry?

A. When we first started there?

Q. No. I say, he speaks of face number one and face number two. Did you ever consider the second quarry that you opened as a face of number one quarry?

A. Oh. Definitely no. Face number two, as you are designating it here, was just a dirt hillside, covered with timber.

Q. Where you found some rock later? [75]

A. Where I found rock later, yes, in desperation looking for rock. It had finally got to a point where we had definitely closed down and the job was stopping for the want of rock and taking a long chance I took the shovel up—I saw a little outcropping of talus slide of good rock up there, is how I came to go into that particular spot, and I took a shovel up there and prospected for it and we were fortunate enough to find it.

Q. Did Mr. Wood locate that for you?

A. No.

Q. Did he ever suggest there was any rock there?

A. No; and, on the contrary, he sort of ridiculed the idea. I told him I thought I would go up there and prospect for rock and he laughed at me. He kidded me about going up there but I went up anyhow.

Mr. Lichty: That is all.

(Testimony of Harry Hildeburn.)

Recross Examination

By Mr. Langley:

Q. Well now, just a minute, please. You say when you went up to this, what you call—I will call it the second face but I understand you don't interpret it as being a second face—you say you noticed that because there was an outcropping up there; is that correct?

A. No. I said I saw a little hilly outcropping at the foot. In other words, just a little piece.

Q. And you discussed this idea with Wood and he sort of ridiculed [76] your going up there, did he?

A. That is right.

Q. Then you didn't apply to the department for authority to move, I take it?

A. That is right. We did not. However, Mr. Wood was very much delighted when we got in there and found good rock.

Q. But you knew that Wood didn't have much authority? You knew the authority was down in San Francisco, didn't you?

A. He had authority enough to accept good rock when he saw it.

Q. So you went up there to that second place right then? Wood didn't have anything to do with it?

A. That is right.

Mr. Langley: That is all.

Mr. Lichty: That is all, Mr. Hildeburn.

(Witness excused.)

T. W. THOMAS

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. What is your name?

A. T. W. Thomas.

Q. What is your occupation or business?

A. Oh, subcontractor, subcontracting on road work, [77]

Q. You specialize somewhat in trucking, do you not?

A. Yes, sir.

Q. Were you operating trucks for Homer Johnson on the case that is before this Court on that road project?

A. I was.

Q. Did you observe the operations of the quarry located approximately three-tenths of a mile right of Station 1239?

A. Yes, sir.

Q. Did your trucks, under your immediate supervision, haul most of the material that was spread on the road there?

A. Yes, sir.

Q. What, Mr. Thomas, was the general quality of the rock that was spread on that road?

Mr. Langley: Maybe he should qualify, if he has had experience.

Mr. Lichty: All right.

Q. Mr. Thomas, how much experience have you had in road construction work?

A. Oh, about twelve or fourteen years.

Q. In that time have you owned and operated

(Testimony of T. W. Thomas.)

gravel trucks in spreading gravel upon highway construction work? A. I have, yes, sir.

Q. That has been your principal business, has it?

A. That is right.

Q. Mr. Thomas, observing this operation of Mr. Johnson's crushing plant, what did you observe as to the quality of the rock that was [78] being produced at that rock quarry?

A. Well, as I remember, we worked, oh, possibly two or three weeks and I heard no complaints and the rock seemed to be O.K., and then it started. My first notice was the delays at the weighing scales, you know. They used to hold the trucks up, oh, anywhere from five to ten minutes and possibly longer, testing the rock out to find out whether it was good or bad, and some of it they would dump along down through the woods close to where we were working and some of it they would take to the road. I was more interested in that part of it than anything else, because—

Q. You were interested in and getting paid for good rock in place on the road?

A. That is right.

Q. Were there numerous or only occasional times when the plant would be shut down while they were moving and trying to find hard rock?

A. I didn't understand the first part of that.

Q. Were the occasions numerous or merely infrequent where they would have the plant shut down while they were trying to prospect for good rock?

A. Yes, it was quite numerous. Of course, it

(Testimony of T. W. Thomas.)

seemed to me like quite a long time, but it seems to me like it was over a period of two or three weeks this was going on.

Q. Do you, Mr. Thomas, have any independent knowledge of the quality of this rock? [79]

A. Oh, I can't say that I have at this long date away.

Mr. Lichty: That is all.

Cross Examination

By Mr. Langley:

Q. The thing that you observed was there that the rock produced didn't meet the specifications under the contract, so they were turning it down; is that correct? A. That is right.

Q. Then the difficulty there was they kept keeping Johnson there and he couldn't produce it? Isn't that about the size of it?

A. Well, I don't know what the trouble was; I couldn't say. But I know the trouble was they wouldn't accept the rock and held us up during this period of time.

Q. Did you haul rock from what I call the second face there?

A. Yes. I hauled all the rock on both setups.

Q. How far do you think it was from the first face to the second face?

A. Oh, somewhere around six hundred feet, I imagine. I couldn't say.

Q. How do you arrive at that determination?

A. Oh, just my remembrance of it.

Q. Just a guess? A. Just a guess.

(Testimony of T. W. Thomas.)

Q. You didn't measure it, did you?

A. No. [80]

Q. Were you there, or were just your truck-drivers there?

A. I was there most of the time.

Mr. Langley: That is all.

(Witness excused.)

C. JACKSON ELDON

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. You are C. Jackson Eldon? A. Right.

..Q. Mr. Eldon, what is your business?

A. I am classed as a general contractor.

Q. How long have you been operating as a general contractor in and around the City of Portland?

A. Well, most of the time since 1907.

Q. Is the partnership of Joplin & Eldon still in existence?

A. The partnership of Joplin & Eldon is being liquidated at the present time.

Q. That partnership has been in existence for how many years? A. Since 1921 until 1941.

Q. In that period of time, Mr. Eldon, have you, as a contractor, performed many contracts for the

(Testimony of C. Jackson Eldon.)

Bureau of Public Roads, State Highway departments of Washington and Oregon? [81]

A. Yes, quite a few.

Q. You have in that time quarried, crushed and spread on the highways of these states a considerable yardage of crushed rock?

A. Yes, quite a large yardage of crushed rock.

Q. Mr. Eldon, you have before you a specification submitted with the proposal for bids, reading as follows: "Sources of Supply. Gravel for crushing is available approximately five-tenths of a mile right of Station 870 and rock for crushing is available approximately three-tenths of a mile right of Station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer." That specification involved the construction of a highway, grading and servicing approximately sixteen and a fraction miles in length. Your Station 1239 is approximately four miles from one end of the job and your Station 870 is located approximately four miles from the other end of the job. This construction project contemplated the spreading of base material and an oil surface on top of that. Having before you that specification, would that representation therein as to the location and availability of rock for that job be a material factor in making your bid?

(Testimony of C. Jackson Eldon.)

A. You read the clause about the availability of the rock and the limitation applying to that.

Q. "Sources of Supply. Gravel for crush- [82]
ing is available approximately five-tenths of a mile right of Station 870 and rock for crushing is available approximately three-tenths of a mile right of Station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing."

A. Now just what is your question? Repeat that.

Q. My question is, having in consideration the project that I have described and the specification I have described, would the representation in the specifications of the availability of materials at those spots be a material factor in figuring your bid?

A. Definitely so.

Q. Mr. Eldon, suppose that it turned out that the quarry located approximately three-tenths of a mile right of Station 1239 consisted of an overlaying of a narrow facing of hard rock, we will say, ten to twenty feet, and as you go into the quarry you encounter soft material which will ball up on a roll crusher, would you say, Mr. Eldon, that such a quarry would be a quarry which complied with the specifications that the specifying officer agreed to provide?

A. Let me ask a question. Was it a known fact at the time that that was the nature of the quarry?

Q. We are disregarding that, Mr. Eldon. I am merely asking you, if it developed that the quarry

(Testimony of C. Jackson Eldon.)

was such as I have described, had soft rock with an overlaying of hard rock, would you say that the specification that rock is available for crushing [83] at that station, would that kind of a quarry in your opinion comply with that specification?

A. I would not consider that to be in accord with the representation made in that preceding paragraph.

Q. Is such a quarry as I have described, Mr. Eldon, in your opinion, a quarry fit for the purposes that I have indicated, for the construction of a road project, and particularly one that requires oil rock surfacing?

A. I would not think so.

Q. In good contracting practice would that be a good rock crushing quarry?

A. I wouldn't think so.

Q. Mr. Eldon, will you explain to the Court if you know why it wouldn't be—first, I will ask you, would it be possible or reasonably possible to produce oil rock from such a quarry?

A. It might be possible but it would be impracticable—impractical. It is possible that some of the rock may have been picked out to produce some oil rock but it is wholly impractical from a contractor's standpoint.

Q. It would be highly expensive then?

A. Well, it would be so expensive it would be prohibitive.

Q. Now will you explain to the Court why that is your opinion.

(Testimony of C. Jackson Eldon.)

A. Oil rock is rock that is produced to cover an oiled surface, and the insistence is that this road material shall be hard and will stand wear. I [84] think most of the places they provide it shall not show a loss on the abrasion test, Los Angeles test, of a certain percentage. When you mix the soft rock with it it is quite difficult to remove the soft rock and any little bunch of soft rock that gets on the oil has a tendency to disintegrate and the oil will pit out, make pockmarks in the oil, making the road surface rough and subject to the action of traffic and the weather at the same time.

Q. Mr. Eldon, in your opinion, having before you Plaintiff's Pre-Trial Exhibit No. 26 showing the exposed face of the quarry before it was shot in this case, would you say that a dragline operation on that quarry would be in conformance with good contracting practice?

A. A dragline method of bringing rock to a crushing line is the cheapest and easiest method of producing it regardless of what the quarry is, if you have a dragline show; that is, an opportunity to use the dragline.

Q. Is that a normal dragline show that is depicted there?

A. Apparently on the face it would be a dragline show.

Q. And the use of a dragline would be in conformity with good contracting practice?

A. Well, that is what I would think of. Doing

(Testimony of C. Jackson Eldon.)

it myself that is what I would think of the first thing—a dragline.

Q. Now in shooting that quarry what would be the customary and usual practice in good contracting circles of drilling and shooting a quarry? [85]

A. It has the appearance of being—you mean the method of shooting?

Q. The method of drilling and method of shooting.

A. Well, it wouldn't drill. It has the appearance of being a case where you would drive a tunnel and use a—use what we call in contractor's parlance coyote holes, and shoot them with coyote holes.

Q. Would there, in your opinion, be anything that is unusual in the line of any contractor's shooting that quarry by coyote holes?

A. No. On the other hand it would be unusual if he didn't use that method.

Q. Mr. Eldon, assuming that in the production of material from the quarry in question the material would ball up on the rolls of the roller crusher, causing the breakage of three to four roll shafts, what in your opinion would such an incident indicate relative to the quality of the material in the quarry?

A. I never had that happen. I can't answer that from experience. I have never had anything like that happen. In fact, I have never had a crusher roll shaft break. In order to cake on the rolls dense enough and tough enough to cause a strain sufficient to break a shaft, I would think it

(Testimony of C. Jackson Eldon.)

would have to have more or less the consistency of hard rubber.

Q. Can you imagine a clay that might do that?

A. I presume there are clays that would do that.

Q. Mr. Eldon, assuming that you encountered material in your drilling operations and crushing operations that would cause that, would you say that such a material was satisfactory material for the construction of a road such as I have described to you?

A. Well, no. I would not think so.

Q. Would the presence of such materials materially retard the progress of crushing operations?

A. It might. It probably would slow it up to the extent of fifty per cent of it going through the crusher. If it was that sticky it would stick to the crusher jaws, to the cone head or mantle, and you would expect it to stick to everything.

Q. Would it in your opinion materially increase the expense to the contractor in performing his contract?

A. Well, I presume he could perform a contract like that, but I do not know whether he could or not with that kind of material.

Q. But if he did would it materially increase his expense?

A. Oh, yes. It would be very expensive to do that.

Mr. Lichty: You may have the witness.

(Testimony of C. Jackson Eldon.)

Cross Examination

By Mr. Langley:

Q. Did you ever go down and look at this place we are talking about? A. No, sir.

Q. Did you talk to Mr. Lichty about this case before you went on the stand?

A. He asked me if on the specifications, if [87] that was a definite location. I told him it was, I would consider it a very definite location.

Q. So you knew what you were going to testify to before you got on the stand, didn't you?

A. No, sir. I knew that.

Q. You knew what you were going to testify to about this specification, didn't you?

A. I knew I was going to testify and if I was asked the question I would say definitely that was a definite location.

Q. You said this specification was a misrepresentation, as I understand it. It would not be a misrepresentation unless the Government knew more about it than the contractor, would it?

Mr. Lichty: That is not the question I asked.

The Witness: Pardon me, I didn't say it was a misrepresentation.

The Court: He said as it was represented.

The Witness: I said as it is represented.

Mr. Langley: Q. Let me ask you this question: If the Government didn't know any more about it than the contractor and it developed there was some soft rock in there, would you say the Government had made a misrepresentation?

(Testimony of C. Jackson Eldon.)

A. If they represented there was suitable rock there and there proved not to be suitable rock there, that would be not—I wouldn't say "misrepresented", but they had misrepresented there would be available rock—there would be available [88] suitable rock there.

Mr. Langley: I think the Court would be a better expert than Mr. Eldon on that point.

Q. Mr. Eldon, assuming that this particular spot we are talking about produced eleven thousand tons of crusher-run material, would you say that it would have been practical to produce cover material during that operation when they were producing the eleven thousand tons?

A. Will you distinguish between crusher-run and cover material?

Q. Yes. Now as I understand your testimony from the hypothetical question that Mr. Lichty asked you, you said it would have been impractical to produce cover material. Now I am asking you, assuming that they produced 11,000 tons from this particular spot of crusher-run, 11,000 tons of crusher-run, would it have been impractical to have produced cover material at the same time?

A. I want to make myself plain. If there was soft material such as is described, it is impracticable to produce oil rock with that soft material in the quarry.

Q. But you are familiar with the specifications for crusher-run material, aren't you?

A. I am as a usual thing.

(Testimony of C. Jackson Eldon.)

Q. Well, if you meet the specifications of crusher-run material for eleven thousand tons, would it be impractical to produce crusher-run at the same time?

The Court: No, not crusher-run. [89]

The Witness: The crusher-run?

Mr. Langley: I mean cover material.

A. Yes.

Q. It would be impractical?

A. Impracticable.

Q. Why?

A. Engineers as a usual thing allow a great deal more latitude in what we call base or crusher-run materials than they do in oil rock. Contractors assume a certain license in producing crusher-run or base course materials. In fact, they are required in many cases to produce a base course material, a great percentage of which will pass a low or a small opening screen and in a lot of cases they say a certain percentage of that may be dirt or sand. Crusher-run material is simply taking a quarry and whatever comes out of the quarry is crusher-run.

Q. Let me ask you this question: Assuming that you had 11,000 tons of good rock before you ever got to any soft rock, would it have been impractical to produce cover material?

A. It is not impractical to produce cover material or oil rock when you have good rock, whether you have eleven thousand tons, ten tons, or a million tons. The idea of producing oil rock is that you must have good material from which to produce it—to produce it practicably.

(Testimony of C. Jackson Eldon.)

Q. Yes. Are you familiar with the specifications of the State of Washington that they use in a typical case like this? [90]

A. I am fairly familiar with the general specifications of the State of Washington.

Q. Are you familiar with the 1935 edition?

A. I wouldn't say. I am familiar with practically all of their editions.

Q. The reason I ask you that, I remember you had a job up there at St. Helens about 1937 or so, didn't you?

A. St. Helens? No.

Q. Well, anyway, do you know whether the Washington specifications state the tolerance which will be allowed when a person shifts his operation from one spot to another spot in a quarry?

A. I have no knowledge of the tolerance of the general specifications and the tolerance the contractor is allowed in producing that specification. For instance, in the three-quarter minus rock which used to be the oil rock they required from 45 to 65 percent of that material to pass a one-quarter inch screen.

Q. I guess I didn't make myself clear. Here is what I have in mind: Suppose someone begins an operation at one place and then moves to another place in an operation.

A. Yes.

Q. Now do you know what the Washington state specifications say about the tolerance that is allowed when you shift your operation?

A. Tolerance in material, or do you mean that the cost will be allowed?

(Testimony of C. Jackson Eldon.)

Q. The cost will be allowed. [91]

A. Yes. Yes. I remember that too.

Q. Well, what does that say?

A. Well, they have a scale down there. I don't remember the exact figures but it seems to me it runs from around 750 to 1250; maybe more than that. That is, that the contractor is allowed the cost of moving his plant from one setup to another setup.

Q. That is it.

A. To get material that will meet the specification.

Q. That is what I have in mind. And your recollection is it is from 750 to 1200; is that correct?

A. No. I said they had a scale, and, if I remember right—understand, I am trusting to my memory now.

Q. Yes; sure.

A. The minimum or the smallest was around 750 and that the second one was around 1250, and it went on up. I don't remember just exactly what those costs were allowed, or what the provision was.

Q. Now how much must they move the plant before they will pay that?

Mr. Lichty: We object, your Honor, on the ground that the Washington specifications for material are the best evidence, and let's don't speculate on what they contain, if they want to get them in evidence.

The Court: He is testing Mr. Eldon's qualifications.

(Testimony of C. Jackson Eldon.)

Mr. Lichty: Well, if he is testing his qualifications—

Mr. Langley: No, I am not.

Mr. Lichty: —he has admitted them to me. He is trying to get [92] in evidence indirectly on the Washington specifications.

Mr. Langley: No, I am not.

The Court: He is testing his qualifications, nevertheless. It is cross-examination.

Mr. Langley: Q. How far will they tolerate a move before they will pay that?

A. I don't remember just how far it is. I believe they have a provision that if it is moved—in fact, I won't say just how many feet; I don't remember that in the specifications; but I know that there is a limit of a minimum distance to move the plant.

Mr. Langley: That is all.

Mr. Lichty: No further questions. Thank you, Mr. Eldon.

(Witness excused.)

Mr. Lichty: The plaintiff rests, your Honor.

Mr. Langley: Your Honor, at this time I would like to move for a directed verdict in favor of the defendant upon the ground that the plaintiff did not follow Article 15 of the contract involved in this action.

The Court: I am going to reserve decision until I hear all of the evidence.

DEFENDANT'S EVIDENCE

B. J. STEELE

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified [93] as follows:

Direct Examination

By Mr. Langley:

Q. Your name, please?

A. B. J. Steele.

Q. And your occupation?

A. My occupation is highway engineer.

Q. By whom are you employed?

A. I am employed by District 2 of the U. S. Public Roads Administration.

Q. And where do they have their office, please?

A. San Francisco.

Q. And what is your specialized work?

A. District Materials Engineer.

Q. How long have you been employed by the Bureau of Public Roads?

A. Approximately twenty years.

Q. What experience have you had in making maps involving roadways?

A. Well, I have been a locating engineer in charge of highway surveys.

Mr. Langley: Will you hand the witness Defendant's Pre-Trial Exhibit 23. Q. Tell us, did you prepare that? A. I prepared this.

Q. What is it?

A. Well, it is a map of the quarry, of the site three-tenths, approximately three-tenths of a mile right of Station 1239. [94]

(Testimony of B. J. Steele.)

Mr. Langley: I offer it in evidence.

Mr. Lichty: May I see it, please?

Mr. Langley: Q. I will ask you just one further question. Did you make it to scale?

A. Yes, it is made to a scale of fifty feet to the inch.

The Court: Didn't you see it at pre-trial, Mr. Lichty?

Mr. Lichty: Yes. I just wanted to be sure that I had the same thing in mind. They put in a number of exhibits there.

The Court: Was that made for this trial?

Mr. Langley: Yes; by request.

Mr. Lichty: No objection.

(The map bearing the legend "Vicinity Map of Quarry Site, California Forest Highway Project 77-D4,E4", etc., with photographs pasted thereto, so offered and received, having been previously marked "Plaintiff's Pre-Trial Exhibit 23" was further marked Defendant's Exhibit 23.)

Mr. Langley: Q. Would you show it to the witness, please. I wish you would just explain there so a person can understand what that map shows or means.

A. Starting at the right, at the highway on the left-hand side of this map—

Mr. Lichty: May I come forward and examine this, your Honor?

The Court: One of you get on one side and the

(Testimony of B. J. Steele.)

other on the other and I will get in a neutral corner. [95]

A. Well, starting at the highway which is constructed with material from the site in question—

Mr. Langley: Q. This is from McCloud, is it?

A. This is to McCloud and this is south (indicating).

Q. Tell us which way this road goes.

A. This road goes east to Burney Falls, or northeast, you might say, to Burney Falls, or southeast to McCloud.

Mr. Lichty: Southeast or southwest?

A. Southwest. That is right.

Mr. Langley: Q. Now what is this? Tell us what this is.

A. Well, this is the place of an old quarry that is adjacent to and in sight of the highway that was used for some work previously.

Q. And what is this along here?

A. This is Bear Creek.

Q. Now show us where three-tenths of a mile right of Station 1239 is.

A. Well, by measuring along the center line of the road it is at this point (indicating), approximately equidistant from the two faces.

Q. This is the face the operation was begun?

A. That is right.

Q. And this is the second face, what we call the second face, is it? A. That is correct.

Q. And three-tenths of a mile is—

A. It falls right here (indicating) by measuring along the center [96] line of the old road, and it falls here (indicating) by airline.

(Testimony of B. J. Steele.)

Q. Now then, by the road how far does your calculation on this map show what we call the second face from the first face?

A. Well, on one edge, on the near edge in each case it is 285 feet straight across, or it is 320 feet by the road between the two faces.

Q. Now then, were you the man responsible for this specification, this source, section 2.2?

A. I recommended that this be one of the sites designated as available.

Q. Now can you tell us what you had in mind when you used the word "approximately"?

A. Well, I had in mind this—yes. I would say the word speaks for itself, "Approximately".

Q. Well, what is the contour? What is up there around it?

A. Well, the greatest exposure of rock was this old face here which had been previously opened and operated by the county, and it didn't cover as large an area as this now does. That had been out in here (indicating) but to the left of that as you face it there was considerable outcropping of rock, and there still is, on the left side of this quarry of what appears to be as durable rock as was ever exposed before in the original face, but at various points up and down the canyon there is flood rock on the surface in the soil.

Q. Now let me ask you this question: If you had intended to have [97] designated that source what would you have said?

(Testimony of B. J. Steele.)

A. We would have said no doubt the existing quarry face so far to the right of this station.

The Court: What was right of the station? Where was the station?

A. The station was here (indicating).

The Court: Then why do you say to the right?

A. Well, the station goes in a—it goes from north to south is why we say “right”.

The Court: Yes.

Mr. Langley: Q. Did you ever run any tests back in there?

A. We had two samples taken out of this old face and laboratory tests made on them. I first saw the site in September, 1936. I was told that it was up there by a resident engineer which we had on other work in the previous contract on this route. I had previous tests on this face down here near the road, but as that would make a landscape scar we didn't want to use that, but he told me of this other place approximately three-tenths of a mile to the right and we together examined it and later we had two samples taken from it.

Q. This is in a national park, is it?

A. Well, it is a national forest highway and the preservation of the landscape adjacent to the road is of importance.

Q. Well now, what relation does that so-called restrictive clause in the specification have with reference to landscape? [98]

A. Well, that is the reason for that clause being in there, that no other source shall be used with-

(Testimony of B. J. Steele.)

out the written approval of the engineer, is to prevent the use of, say, a face like this which would be in sight of the road or at some other point along the road. There might be suitable rock at many places which would be objectionable from the landscape standpoint. With that clause in there the engineer has control over opening sources.

Q. Were those photographs taken while you were there?

A. These photographs were taken under my direction at the time I made this map.

Mr. Langley: I guess that is all of the questions I have on the map.

Q. Mr. Steele, in this specification there are two sources designated and I think that Mr. Johnson has testified that the fact that two sources were stated there was of material effect in his bid, in the way he figured the bid. Now then, what is your side of it? Why did you put the two spots in there?

A. Well, we had this gravel pit five-tenths—

The Court: The map doesn't show the gravel pit, does it?

Mr. Langley: No. I will put that one in. The gravel pit is way down at the other end?

The Court: There are two sources you are talking about. One is the gravel pit?

Mr. Langley: When I speak about the two sources I am speaking of two sources in the contract. This is at 1239, which is the [99] quarry, and the other is at 870. That is the gravel pit.

(Testimony of B. J. Steele.)

The Witness: We had considerable knowledge of this gravel pit five-tenths of a mile right of Station 870 because it had been used in a previous contract on this road. We did, however, make the usual additional tests on the material. Then it was desirable to find a source nearer the south end of the job and this source designated right of Station 1239, approximately three-tenths of a mile right, seemed a logical source to designate.

Q. Well, the point I am getting at is, did it make any difference to you whether the contractor—

A. Oh, not at all. The first thought about the matter was to specify only this gravel pit which had been used on the previous contract, and of course many contractors—some contractors might have preferred to crush the gravel and haul it a longer distance rather than install the heavy equipment for crushing rock. On the other hand, by specifying this source it gave an opportunity to contractors which were equipped to handle rock to use it economically. There was no investigation of quantities available other than just the examination of the general outcrops along the side of the canyon at this 1239 source made.

Q. There is nothing in the specification, is there, that says that he has got to use both sources?

A. Certainly not. There is nothing in the specification that says that he must use both sources, and we had no desire one way or the other in the matter, whether he used one source or two. [100]

Q. In other words, some man's equipment might fit just one source? Is that what you had in mind?

(Testimony of B. J. Steele.)

A. Well, yes. The lighter portable plants might be used for crushing only the gravel and then hauling longer distances.

Q. Is this word in the specifications "available", is that a word of your choosing?

A. That word means "designate".

Q. That is what you intended it to mean?

A. Yes.

The Court: Means what?

A. Means a designated source.

Mr. Langley: Q. Now, Mr. Steele, in the questions that I have asked you I have tried to cover two points. One of them is your position about this provision not being a warranty, and the other as to what we call the second face, is the position of it, that it is not a change of site. You see what I mean? I tried to cover those two points. Now one other contention that you have is that this quarry did not fail; it was a satisfactory quarry; is that correct?

A. That is our contention.

Q. Now in the regular course of business were production records kept by the Government?

A. They were kept.

Q. Do you have those production records with you?

A. Yes, I have. [101]

Q. And did you make a summary of those production records?

A. I did.

Q. Do you have that summary here?

A. Yes, sir. I have it in my pocket.

(Testimony of B. J. Steele.)

Q. Well now, I think that you had better explain how you took that summary off of the books, as briefly as you can.

A. Well, any information that I have summarized on here was taken either from the diary, which is on file with the Court, or from the daily production record books, of which the transcribed reports are on file with the Court, or from the plant inspector's daily record of the operations of the plant.

Q. Now what does your summary show?

Mr. Lichty: We first want to know if all of those things are in evidence here.

Mr. Langley: No, I don't think so. That is correct.

Q. Now what books are there that you brought up with you yesterday from San Francisco that had not been here before?

A. Well, I would say this, Mr. Langley: The material, so far as production records from day to day are concerned, are on those reports signed by Wood, which were taken out of those books, although I actually obtained the same material from the books. We have turned over to the Court the transcribed sheets.

Q. That is Defendant's Exhibit No. 21, I think. Look at 21 there, please, and see if that is what you are talking about. It is a thick book, Ross. Hand that to the witness. That is Exhibit 21. [102] Is that what you are talking about?

(Testimony of B. J. Steele.)

A. Yes, sir, this is what I am talking about, and the same—

Q. Just a minute. Do you know the handwriting of Mr. Wood?

A. Yes, I do, from long years of experience with it.

Q. Can you tell by looking at that whether that is his handwriting or not?

A. Do you wish me to examine all of these signatures?

Mr. Langley: No.

Mr. Lichty: No, no, no.

A. Well, I would say that this is Mr. Wood's handwriting.

Mr. Langley: Q. That was kept in the regular course of business?

A. And it was kept in the regular course of business.

Mr. Langley: Well, we will offer it in evidence.

Mr. Lichty: What is the purpose of keeping that record?

A. Well, that is to show the District Office each day's production and this is sent in—these reports that I have in my hand are mailed in by the Resident Engineer each day so that the District Office is advised day by day of the production of material from sources being used. The Resident Engineer keeps on the project a book which all of this material is entered in and from which he makes up his estimate.

Mr. Lichty: That is a copy from his book?

(Testimony of B. J. Steele.)

A. That is a copy from his book.

Mr. Lichty: His book is his original record?

A. That is correct. [103]

Mr. Lichty: We object to the introduction of those on the ground that it is not an original record. It is merely sent in as his interpretation of his original record.

Mr. Langley: Q. You mean this you have in your hand is a copy?

A. Well, it is made out daily by the Resident Engineer.

Q. On the job? A. On the job.

Q. In the regular course of business?

A. In the regular course of business, and it is made as the rock is weighed, load by load, and it is recorded in a book and at the end of the day he adds that up and makes out this daily report to send to the office, so this is a summary of the day's work.

Mr. Lichty: It is his interpretation of what his book reflects?

A. I would not say an interpretation. It is a record made—

Mr. Lichty: He makes it up from some other record? He does not keep that in his mind when he sets it down on paper, does he?

A. No. He adds up in the book the total tonnage for the day and puts it on this record.

Mr. Lichty: Well, we would like to have that report.

(Testimony of B. J. Steele.)

Mr. Langley: Well, I don't like to insist on this rule but you know what the rule is. You have got to reserve your objection at the pre-trial if you are going to make that, to give us a chance to meet that, so we could have brought the book up.

Mr. Lichty: I don't object to this being what it is but I say it is not proper to introduce it in evidence. I am not saying it [104] is not Mr. Wood's writing. I still say I don't think it proves what it does show.

The Court: I admit it subject to the objection. I also admit this gentleman's summary, subject to objection.

(The Original Daily Report for Crushed Rock Surfacing kept by Joseph E. Wood, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 21, was further marked "and trial"; and the "Summary of Production Record of Crushed Rock and Crushed Gravel Materials"; so offered and received, was marked Defendant's Exhibit 291½.)

Mr. Langley: All right. Then hurry and go over that summary as quickly as you can.

A. "Project Records kept by Resident Engineer Wood and his assistants show that all crushed rock and crushed gravel materials required for completion of the project were obtained by the contractor from the sources designated in Special Provisions of the contract. These records show the fol-

(Testimony of B. J. Steele.)

lowing kinds and quantities of materials were obtained from these sources:

“(Rock) Approximately 0.3 mile right of Station 1239, Crusher-run top course”—

Q. Just a minute. You are talking about what we call the first face now?

A. I am talking about the entire quarry. I can give you additional [105] detail on that later.

Q. All right.

A. From the source approximately three-tenths of a mile right of Station 1239, 24,359, which is the crusher-run top course, was produced. From the gravel pit approximately five-tenths of a mile right of Station 870 the following materials were produced: Crusher-run top course 20,815 tons. Supplemental crushed stone in stockpile 489 tons; cover material, previously referred to here as oil rock, 3,586 tons; making a total from this second source of 24,890 tons.

Now the quantities from the two sources added together make a total of 49,249 tons of crushed materials required to complete the contract. Of this total 49,249 tons, 24,359 were obtained from the source approximately three-tenths of a mile right of Station 1239 and 24,890 tons from the source approximately five-tenths of a mile right of Station 870.

Q. Now you understand, of course, that their contention is that there were two different sources up there at 1239, don't you?

(Testimony of B. J. Steele.)

A. Well, yes, I do.

Q. Now how much does your summary show of crusher-run was produced at what we call face number one?

A. The records show, 1, that a total of 24,359 tons were produced from this source; 2, that 15,890 tons were produced from face number one before any rock was taken from face number two; 3, after starting to take rock from face number two on September 8th, 1937, [106] rock was obtained alternately from face number one and face number two; 4, from production record of shifts during which rock was obtained from face number two not more than 4,262 tons could have been produced from face number two; 5, of the total 24,359 tons produced at least 20,097 tons came from face number one and not more than 4,262 tons came from face number two.

Q. We don't make any contention that any cover material was ever produced at 1239, do we?

A. No material was produced to our knowledge—no cover material.

Q. I mean accepted. No cover material was ever accepted from the operation at 1239; is that correct?

A. It was never accepted or rejected.

Q. And what is your contention about it being produced there?

A. Well, shall I tell you the first time I saw the quarry after the operation started?

(Testimony of B. J. Steele.)

Q. Yes. That is the conversation which the superintendent tells about; is that correct?

A. Yes.

Q. All right. Let's have your version of that.

A. All right. On July 17th, 1937, I visited the project and at the Resident Engineer's request—

Q. Well, before you get ahead, how do you happen to visit the project?

A. Our District Construction Engineer had had a telephone call either from Mr. Johnson or Mr. Wood and he happened to know that [107] I was going up into that vicinity on another project within a day or so and he asked me if I would not incidentally drop up and inspect this quarry site.

Q. All right. Now tell us the conversation that you had there.

A. Well, Mr. Wood and I crawled in the coyote holes with flashlights and we found alternate hard and soft material. We re-examined the original face that was opened above and it appeared all right as before. The conclusion was that while we had encountered some soft material in these coyote holes, that it didn't follow that there wasn't a substantial quantity of suitable rock here. After discussing the matter with Mr. Wood I advised him that if the contractor elected to proceed and load and shoot this coyote hole, that it was rather obvious that he would evidently get down to soft material in the bottom of this quarry which would not be usable, or could be used only as for fine material in the crusher-run course. But it was my opinion at the

(Testimony of B. J. Steele.)

time that there was a large quantity of suitable rock that could be used for cover aggregate, if the cover aggregate was made prior to getting down into the soft rock. We later discussed the matter with the contractor's superintendent and that is all that we had to say about it.

Q. Well, what did you tell the contractor's superintendent—your best recollection?

A. Well, I either told him or Mr. Wood told him, after advising with me, that we thought that he could obtain a substantial quantity [108] of suitable material out of the quarry, but that certainly these soft pockets which showed up in the bottom could not be used for any purpose other than the supplying of deficiency of fine material in the harder rock, and that shooting the holes with the soft material in the bottom would no doubt intermix with the harder rock above to some extent but not necessarily for the top fifteen or twenty feet.

Q. Is that the only conversation that you ever had with Mr. Johnson or any of his employees about this quarry?

A. I didn't have a conversation with Mr. Johnson at that time. It is my recollection the superintendent was on the project.

Q. Yes, but I mean after that did you ever have a conversation with Johnson? A. Yes.

Q. Or any of his employees?

A. Well, not with the contractor's employees. I did have a subsequent conversation with the Resident Engineer about the quarry.

(Testimony of B. J. Steele.)

Q. Well, we had better have the whole story. Let's have what you said.

Mr. Lichty: Well, I object to that now on the same ground. You have been hollering about hear-say.

Mr. Langley: O.K. That is all right. I don't care about having it.

Q. Now I think, Mr. Steele, that there was some testimony by Mr. Johnson that you talked to him. Do you remember talking to him? [109]

A. Well, I believe that Mr. Johnson's memory fails him about the conference in July; that he was not on the project at the time I was. I did see Mr. Johnson on July 31st on the project—on August 31st, rather.

Mr. Langley: That is all the questions we have.

Mr. Lichty: At this time, your Honor, before cross-examination, I wish to make a motion for the record, and that is, I move to strike all the testimony of this witness relative to anything reflected in the reports which Mr. Wood made to the District Office, in which he has used summarizations.

The Court: The reports and the testimony based thereon are admitted, subject to the objection.

Cross Examination

By Mr. Lichty:

Q. Mr. Steele, in your measurements which you very kindly made on this map for us, can you tell me why in measuring the distance from the station on the highway to the face of that quarry you didn't measure along the most obvious route to the face of

(Testimony of B. J. Steele.)

that quarry. In other words, there is a road branching off, marked Station 11 plus 70.5; there is a road branching off to the north there up leading to the face, what you call Face No. 1 of the Johnson quarry. Now can you tell me why in making your measurements of three-tenths of a mile to the right of that road you didn't follow the road directly into the quarry rather than following down the highway that the quarry is not located on? [110]

A. Actually I did, and that is on here to scale, although not shown in figures. It is my idea it was obvious that you could visualize swinging this line, this mark here, you could swing it over here, you could swing it over here (indicating).

Q. That would be directly at the face of the quarry?

A. That would be very close to the existing face.

Q. Don't you think the contractor in examining the site of that work and looking at the quarry would measure three-tenths of a mile down rather than go down the road which the quarry was not facing?

A. I think measuring the sites with his speedometer, if any, if he got anywhere in this vicinity he would consider the face of the quarry. I think it is very logical he would consider this open face as the site of the quarry.

Q. That is right. And he would not go down the road on which the face was not located to measure the distance to the quarry, would he?

(Testimony of B. J. Steele.)

A. I don't think he would. I think he would measure it here and would get the same distance.

Q. Now what you call face number two of the quarry, did you at any time when you were up there examining this quarry site, did you ever go there and locate any rock there?

A. I can't say that I did. I can say that I walked along the floor of this canyon both below and above this site, but to say that I specifically located rock there I cannot testify I did. [111]

Q. And in your opinion when you viewed what you call face number one of the Johnson quarry you thought that there was sufficient rock in that immediate area where the face was opened for the contractor's purposes, did you not?

A. At the time that we examined that face and at the time we made subsequent tests I didn't know the quantities of material involved. I simply determined the quality of the material in places exposed in this face, and I checked it against previous tests of material down here adjacent to the road of the same type and it happened to check very close and satisfied us as to the quality of it.

Q. And you anticipated that the contractor in drilling, blasting and using the quarry would use what you call face one of the Johnson quarry?

A. I would say that it would be a very logical place to start in.

Q. And that is what you anticipated when you took samples off of that face?

(Testimony of B. J. Steele.)

A. Well, I felt there was every reason to believe, with the exposure down here and the exposure here and the float rock along at approximately the same elevation, that you might hit this rock anywhere you would go into the hill all the way from the highway up here and above.

Q. Now when you went up there and went into the coyote hole and found what you say were soft stratas intermingled with hard stratas of rock——

A. I said pockets. [112]

Q. Yes. They were just pockets; there were no stratas? A. No definite strata.

Q. No definite strata? A. Just pockets.

Q. And you didn't find as you got in farther it got softer?

A. My recollection of the matter is that it was hard and soft, and then it would get harder and somewhat softer. It was quite variable at the elevation. You see, the previous face, or the original old face used by the county was at a considerably higher elevation and this coyote hole was put in down at the——

Q. Creek bed level?

A. Well, approximately so; the level of this flat, at any rate, which was logical enough. So you were in at an elevation not previously exposed when you put the coyote hole in. The coyote hole was an exploration of an elevation not previously explored.

Q. In your opinion was it improper to coyote

(Testimony of B. J. Steele.)

that quarry and shoot it? Would there have been any other more satisfactory method?

A. I think it was a very logical method to adopt for boring.

Q. The only other way is down-holes, isn't it?

A. That is right.

Q. And then shoot down-holes when you have an exposed face, just in a flat surface?

A. Pardon?

Q. Isn't it? A. Pardon me? [113]

Q. Your down-hole shooting is not ordinarily undertaken where you have a bluff to work on, is it?

A. Well, it is quite often undertaken, yes.

Q. But not ordinarily?

A. Well, I would say I have seen it employed a great deal—a great deal more than coyote holes, in the territory in which I worked in California and Arizona. Down-hole drilling is very common.

Q. In quarry faces?

A. In quarry faces. May I add here——

Q. Add anything you wish.

A. I would say from the exposure of rock at the time he went to the quarry to drill his hole a coyote hole was the logical idea. Now as to whether he should have moved that hole up to a higher elevation after he found soft rock below the rock previously exposed is another question. That was a matter for his judgment, of course.

Q. You didn't suggest it to him?

(Testimony of B. J. Steele.)

A. I didn't suggest it to him. I simply called attention to the fact he would shoot loose unsuitable material if he blasted the hole as drilled.

Q. Did you suggest to him at the time he had better explore for other rock someplace else?

A. No, I did not.

Q. Now you say it was desirable to locate some rock near the south [114] end of the job. Why was that desirable?

A. To make a shorter haul.

Q. That is right. And in making a shorter haul to save the cost of the project?

A. That is right. (Witness nods his head.)

Q. The answer is "Yes?"

A. Yes.

Q. You say your first thought was to use only the gravel from the proved source that was near Station 870? That had been proved? It had been used on the road previously. But the reason for your designating another source was in order to cut down the overhaul, wasn't it?

A. That is correct, which the source did accomplish.

Mr. Lichty: That is all.

Redirect Examination

By Mr. Langley:

Q. On that question about the purpose in designating two sources being to cut down the cost of operation, you mean by that, do you not, if the contractor proposes or determines to use two sites? Is that correct?

A. If he proposes or determines to use two sites.

(Testimony of B. J. Steele.)

Q. But you also had another reason, and that was to give him his choice of using one or the other absolutely, didn't you? A. How is that again?

Q. But you had another reason for designating two sources, so that [115] the contractor could, if he desired, use one source exclusively?

A. One or both, yes.

Q. Sure; to give him more——

A. To the extent that he found material at either source.

Q. In other words, your sole purpose in making two designations was not that the contractor must use two? A. Oh, absolutely not.

Q. One of the Government's points, I think, is, Mr. Steele, that the second face is within approximately three-tenths of a mile right of 1239. Now in that connection, in your experience what distance is a tolerance between sites of operation, beyond which compensation will be paid?

A. Well, I have seen a number of operations where a contractor would work from one thousand to two thousand feet along the face of a bluff, selecting rock at one place and skipping a section where the rock was not good. We have many cases——

Q. What is the general practice of tolerance?

A. Well, there is a rather general practice in earth work, for instance, on a road construction, to allow a free haul of five hundred or a thousand feet. Some states designate how far—some states provide a definite method of compensation in case the desig-

(Testimony of B. J. Steele.)

nated floor is exhausted, and then they further designate that a contractor must move a certain distance away from the original face before it is considered a new source.

Q. Well, how far is that? [116]

A. Well, Washington state has a——

Mr. Lichty: We object to that, your Honor, as immaterial; and on the further ground that the best evidence of it would be the specifications of the State of Washington.

The Court: He may testify subject to the objection.

A. Washington state has a clause in their specification that they will not pay for crusher moves of less than one thousand feet.

Mr. Langley: Q. Do you consider that reasonable? A. I would consider that reasonable.

Q. Did you have that in mind when you specified this approximately three-tenths of a mile?

A. Yes. In specifying approximately, why, that was the general area. The point was that we would have gone into this source which I pointed out down adjacent to the road for shorter haul, except for the landscape scar. The reason for moving up the canyon was to get the cover of the trees. So that, anywhere he could produce rock without the scar showing at the highway would have been satisfactory to us—the distance of a thousand feet, you might say, either way.

Mr. Langley: That is all. Thank you.

(Witness excused.)

Mr. Langley: Mr. Brown, will you take the stand?

Mr. Lichty: Your Honor, could I have about five minutes before he starts? [117]

The Court: Yes.

Mr. Langley: I might say to your Honor, this is my last witness, so we will finish.

(Short recess.)

LEVANT BROWN

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Langley:

Q. Your name, please?

A. My name is Levant Brown.

Q. And your occupation?

A. I am a senior highway engineer in the Public Roads Administration at San Francisco.

Q. What was your employment in 1937 and possibly '38?

A. I was assigned as engineer in charge of the forest and park road division of the District, under the District Engineer.

The Court: I think I know the answer but I want the record to show here, so I bring it up before I forget it. Who owned these materials, and so on? You see what I mean? Do you know what I mean? The gentleman who just testified

(Testimony of Levant Brown.)

said he could go any place within a thousand feet one way or another and get this same rock, but who owns the rock?

Mr. Langley: Can you answer that?

A. The location to the right of 1239 was on National Forest land. [118] It was in Government ownership.

The Court: Well, that still is not the whole story. If I went out there and took some of it, or picked some wildflowers I would be in trouble within a certain number of feet from the road. There must be some provisions in the statute that in the construction of a road through a national forest nobody may use material from either side a certain distance from the highway. Is that it?

A. That is true as far as rights of way are concerned. When a road project is programmed by the Secretary through national forest land it includes the right of way. When the material such as a quarry is to be obtained a special use permit is required from the District Forester.

The Court: Who obtains that? The Bureau of Public Roads?

A. Well, the Public Roads does. We have adopted the general policy of obtaining the quarries in order that there be free competition among the contractors; that there will be no one contractor who can go out and get an option on a certain quarry on private land and prevent other contractors from bidding because he owns the option to the materials.

(Testimony of Levant Brown.)

The Court: So there must be a use permit in existence some place which permitted the Public Roads Bureau to advertise that certain quarries were open to use by the successful contractor?

A. The quarry at 1239, your Honor, was such a quarry. The one at the gravel pit at 870, or to the right of 870, was on private land. [119] We had an agreement, through the State of California, to pay royalty on the material taken from that gravel pit.

The Court: Thank you, sir.

Mr. Langley: Q. Is it a fact that Joseph E. Wood was Resident Engineer on this job?

A. Joseph E. Wood has been a Public Roads employee for many years and was Resident Engineer on this project.

Q. To the best of your knowledge where is Joseph E. Wood now?

A. In the Southwest Pacific some place.

Q. And when he left your service where did he go?

A. When he left our service, which was approximately January of 1941, late in '40 or early in '41, he went to a draft training camp.

Q. Well, the point I am getting at, when he left your service he went into the army; is that correct?

A. He went into the army. He was a captain in the Engineer Reserve Corps.

Q. And when was that, do you say?

A. Late in 1940 or early in 1941.

(Testimony of Levant Brown.)

Q. I see. And have you been able to communicate with him since he has been in the army?

A. Yes. We communicated with him about a year ago, I would say, and we first communicated with his wife to get his address. She gave it to us and we wrote him direct, asking him when he would likely return, or if there was any possibility of his returning [120] within a reasonable time. We got a reply to the effect that he expected he would be returned within six months after the duration.

Q. And have you made any effort to secure his attendance here through the War Department?

A. No. We haven't thought that was a possibility. Joe Wood is now a Major of Engineers and we felt that his services in his present capacity were probably much more important to the war effort than his attendance on this case. We felt that if we should ask the War Department for his return it would meet with an instant refusal.

Q. And have you attempted to make arrangements to take his deposition?

A. No, we did not do that for the same reason, that we thought it was useless to demand his attendance at this case.

Q. Do you know Joe Wood's handwriting when you see it? A. Oh, yes.

Mr. Langley: Would you show the witness Defendant's Pre-Trial Exhibit 20?

Mr. Lichty: We admit that is his diary, if that is what you want.

Mr. Langley: All right.

(Testimony of Levant Brown.)

Q. Was that kept in the regular course of business?

A. All of Public Roads' resident engineers are under current instructions to keep a diary of important events that occur on the project every day. If they do not do so they are properly—well, we say a few harsh words to them. [121]

Q. Was that Defendant's Exhibit 20 handed in to the Bureau by Joseph Wood at the completion of this job?

A. This was returned to San Francisco along with the balance of the project papers and has been under my direction since that period of time.

Q. And that is his handwriting?

A. This is not handwriting as such. It is printing, sir.

The Court: Well, Mr. Lichty no doubt will stipulate that is Wood's diary.

Mr. Lichty: I stipulate it was Mr. Wood's diary kept on the project.

Mr. Langley: Well, I move its admission in evidence.

Mr. Lichty: We object, your Honor, in that it contains much self-serving material; that it is not a record of happenings and events but it is also his interpretation of them, and that there is no chance for cross-examination.

Mr. Langley: Well now, for the record, we——

The Court: You don't need to say anything for the record. It is admitted. The objection is overruled. The diary will be admitted.

(Testimony of Levant Brown.)

(The Original Diary of Daily Events, kept by Joseph E. Wood, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 20, was further marked "and trial.")

Mr. Langley: Mr. Brown, I think the final contention so far as our case is concerned is that Mr. Johnson did not begin operations within what the defendant claims to be a reasonable time after he received notice from the Government. Is that correct? A. That is correct.

Q. Now do you know when the Bureau of Public Roads notified Mr. Johnson that he was the low bidder?

A. The bids were opened on the afternoon of May 18th at two o'clock, 1937. Mr. Johnson was the low bidder and at his request we sent him a collect telegram informing him that he was the low bidder, and the name and bid price of the second bidder.

Q. Then when did you communicate with him next about it?

A. The next communication, according to my recollection, was on the 7th of June. We received a telegram from Washington stating that the Secretary had accepted Mr. Johnson's proposal. We sent Mr. Johnson a night wire, stating that his bid had been accepted and that his time would start on the 10th of June. According to previous testimony, Mr. Johnson stated that that wire was received at the

(Testimony of Levant Brown.)

Imperial Hotel on the 8th of June, and he received it the 9th of June, which in my opinion is correct.

Q. Now Mr. Brown, will you just go ahead and tell us what your contention is about this.

A. I wish to state that as administrative engineer in charge of the progress of this contract, as well as the other contracts that the District had under way at that time, we were very much [123] concerned over Mr. Johnson's apparent lack of appreciation of the necessity of early action on the project. The specifications called for a time limit of one hundred twenty days. That expired October 7th, 1937. There was a prohibition in the specifications which provided the contractor should not work on Sundays and holidays—should do no productive work. I might state that that provision had been inserted in all of our contracts because contractors were inclined to work seven days a week. It kept our engineering party on the job seven days a week and gave them no opportunity for rest or recreation. In addition to that—the fact, rather, that he could not work on Sundays and holidays approximately twenty days off of the contract time. His time was four months, four calendar months, one hundred twenty days, and there would be about twenty days in there, roughly, counting Sundays and holidays, on which the contractor could not work—was not supposed to work. He had approximately 49,000 tons of material to get out and place on the road. He also had to erect his plant, develop and shoot his quarry. A reasonable time for that would be

(Testimony of Levant Brown.)

thirty days, ordinary time. That cut his time down, his effective time for operations, to practically seventy days, which required an output, daily output, of 700 tons a day.

Although Mr. Johnson was advised on the 18th of May that he was the low bidder on the contract, and was again advised on the 8th or 9th of June that he had been awarded the contract, there was no apparent action on his part until he visited the project [124] with his superintendent and, according to the testimony here today, with Mr. Thomas, the contractor for his trucks, until the 18th, I think it was according to the diary, the 18th of June. They stayed on the project the one day. They left the project—testified they came back to Portland. The superintendent returned to the project on the 28th of June. He testified I think that he came back in about a week. Well, it was actually ten days. He had lost, or Mr. Johnson had lost nineteen days there from the 10th of June until the 28th of June, inclusive, on which no work was done on the project.

When the superintendent arrived he brought an air compressor with him and started properly to develop the quarry. I think the record shows that they started the coyote hole on the 5th of July. He completed the coyote hole, again according to the record, Mr. Woods' diary, about the 22nd of July, at which time there was no powder on the job. I guess maybe he completed the coyote hole a couple

(Testimony of Levant Brown.)

of days sooner, because there was no powder on the job when it was completed. They shot the coyote hole—they shot the quarry on the 23rd of July. The rock crushers had arrived the previous day, the 22nd. He didn't produce any rock until the 9th of the next month, which was sixty days from the time that his contract time started. In other words, fifty percent of his time had gone by before he performed any productive operations.

The Government engineers were very much concerned with [125] regard to Mr. Johnson's apparent lack of appreciation of the time situation. We could not appreciate why it was. We did hand him several communications. We wrote to him on the 8th of July. I have a copy of that letter here, if the defense attorney wishes to offer it as evidence in this case, in which we wrote Mr. Johnson:

“Your attention is called to the fact that twenty percent of the contract time of your contract with California Forest Highway Project 77-D4,E4, Mt. Shasta-Mt. Lassen has elapsed and little or no work has been performed. It will be necessary for you to take immediate steps towards setting up the crushing plant and to start construction operations without delay. Please advise me a once what steps you intend to take.” Signed, “Yours very truly, C. H. Sweatser, District Engineer, by Charles C. Morris, Senior Highway Engineer.”

The Supervising Engineer, Mr. Potter, was on the job about the 18th or 19th of July and he saw the

(Testimony of Levant Brown.)

superintendent, I think, and again spoke to him about the necessity of speeding up operations.

On the 24th of August we wrote to Mr. Johnson again:

“In view of the very unsatisfactory progress of your contract for construction, California Forest Highway Project 77-D4,E4, it is requested you arrange to come to San Francisco as soon as possible. This meeting is requested in order that we may discuss your plan of operation and determine whether or not [126] the contract shall be allowed to proceed.”

Signed, “Yours very truly, C. H. Sweatser, District Engineer.”

Apparently Mr. Johnson either had some reason for not placing his——

Mr. Langley: Maybe you had just better say what you know and not your conclusion. Let's stay with that.

The Witness: Well, to proceed with the narration of the time between August 9th and September 18th, I think the record indicates that twenty-four thousand odd tons of material was produced at the site three-tenths of a mile right of Station 1239, at which time the material which was required for the easterly half of the contract had been produced except the cover material. There is a notation in Mr. Wood's diary to the effect that on the 18th of September a shaft in the roll's crusher broke and rather than await the completion of repairs the contractor decided to move to the gravel pit at Station 870.

(Testimony of Levant Brown.)

According to Mr. Wood, he discussed it with him and he had his approval for the move, although he states that there was still apparently plenty of hard rock in the quarry available for cover material. It took him about nine days to move his plant and set up at Station 870, and he started producing rock there about the 28th of September and completed his crusher-run material on—I can't recall that date, but he apparently had no difficulty at that plant. After completing his crusher-run material a period of about a week or [127] so in which he crushed his cover material, the operations for the season of 1938 were shut down on November 4th or 5th, at which time Mr. Johnson had completed all his crushed material and had spread most of it on the road, except for the cover material.

Q. You mean 1937?

A. 1937. Did I say '38? In June of '38 Mr. Wood returned to the project about the 10th or 12th of June and informed the contractor by a letter that his time would start on the 16th of June; that is the re-open contract time; and Mr. Johnson came to the project on the 18th and actually re-opened work on the 20th. Between the 20th of June and the 15th of July he was scarifying and reshaping and repriming the work which he had done the previous fall and which work would not have been necessary to do over again had he been able to complete the previous fall. From the 15th of July at noon until the night of August 1st, or August 2nd, he spent in putting on the armor coat and the

(Testimony of Levant Brown.)

project was accepted as completed on the night of August 2nd. There is nineteen days it took the contractor to complete the armor material after he had reshaped, completed the reshaping of the road which had been damaged by standing over the winter.

It is the Government's contention that had not Mr. Johnson delayed getting started at the beginning of his contracting time, had he had his crushing plant on the project installed after he shot the quarry,—if there had not been that delay of some two weeks he would have gained thirty days on the 1937 season. [128] To put it the other way, he would not have lost thirty days. He completed his operations, his rock crushing operations for the crusher-run or top course on October 17th. If he had not delayed that thirty days and all operations had gone on just as they did, the actual time consumed, he would have completed his crushing operations the 17th of September. From the 17th of September plus this nineteen days which he required in 1938 season to put the armor coat on and complete his project, he would have completed within the contract time, which ended October 7th.

Q. In other words, as I understand it, what you are getting at is, in your opinion a reasonable time in which to set up his equipment was thirty days?

A. A reasonable time within which to set up his equipment was thirty days, especially in view of his advance information of three weeks that he was the low bidder on the job.

(Testimony of Levant Brown.)

Q. So you think by July 10th it was reasonable for him to be going by that date; is that correct?

A. Yes.

Q. And he produced on about August 9th; is that right? A. Yes.

Q. And that is about thirty days? A. Yes.

Q. Now then, according to your calculations, if he had gotten started, if he had produced on July 10th instead of August 9th, he would have finished in 1937; is that right. [129]

A. He would have finished in 1937.

Q. Now can you just explain that very quickly and briefly, how you arrive at that conclusion?

A. I have explained that. Is it clear to you, sir?

The Court: That is a hard question you are asking me. I think he covered it.

Mr. Langley: All right.

Mr. Lichty: He has covered it thoroughly.

Mr. Langley: All right.

Q. Now then, Mr. Johnson did some work in the season of 1937 that he re-did in 1938. You have heard his testimony about it. I don't think you are making any contention he didn't do that, are you?

A. No.

Q. Now what is your position about it?

A. The Government's position on that is that if he had completed in '37, as he should have according to his contract, that work in '38 would have not been required. The project would have been accepted from him in 1937, at the end of the season. There would have been no possible claim for any repair

(Testimony of Levant Brown.)

work, any reshaping work, any claim for liquidated damages or any additional oil lost by the Government.

Q. Had his work in 1937 ever been accepted?

A. No. The work in 1937 was never accepted.

Q. And concerning his payment and acceptance, what relationship does that have? [130]

A. What our practice and contract provides is to give the contractor a progress payment every thirty days. His final payment is not made until the contract is accepted and has been approved by the Chief of the Bureau.

Q. So your position then is, relative to the 1937 work that he did in 1938, you didn't accept anything in 1937?

A. No. No work was accepted in 1937.

Q. Yes. And you are not obliged to pay him under the contract, according to your interpretation, until he has completed the work? A. Yes.

Q. So then when he had to do what he did in 1937 over again in 1938, that was because not only of his delay but also under the contract you don't feel that you are responsible because it had not been accepted; is that correct?

A. No. There was no responsibility on the part of the Government for any non-acceptance of un-completed work.

Mr. Langley: That is all the questions I have.

(Testimony of Levant Brown.)

Cross Examination

By Mr. Lichty:

Q. Mr. Brown, when do you start his time running?

A. His time started on the 10th of June, 1937.

Q. How do you fix that?

A. That was set by the District Engineer after the award of contract.

Q. You say they received notice from Washington on June 7th. [131]

A. Yes, sir.

Q. That the contract had been awarded?

A. Yes, sir; that the contract—that Mr. Johnson's proposal had been accepted.

Q. Then you think that he ought to have been working on that job three days later, on June 10th?

A. No. No. The contract provides he shall start work within ten days after receiving notification of award. That would have had him start on the 20th of June. He actually——

Q. Why do you start his time on the 9th, then? Why did you say his time starts on the 9th of June?

A. His time started on the 10th of June, but he has to begin operations within ten days from that date. That is a provision in the specifications.

Q. Then his time does not start to run ten days after notice to proceed?

A. No. His time starts to run when his time is started.

Q. And immediately that his bid is accepted in

(Testimony of Levant Brown.)

Washington they notify him by telegram and his time starts to run; is that is?

A. Well, there was a three-day interval in there.

Q. And the contractor doesn't know until you give him that notification that his bid ever will be accepted?

A. Well, he had the advance information that he was the low bidder on that, on the job, and it is general information that when a man is a low bidder he is awarded the contract [132]

Q. Didn't you write him on June 3rd that, although he was the low bidder, not to make any preparations to do any work until he had been notified of the award?

A. That is a routine admonishment so that a contractor will not actually expend money.

Q. It is a protection for the Department in case they don't award it?

A. To protect, and the possibility of a non-award.

Q. That is right. And the contractor gets that letter, and yet in the Department's eyes he should be starting to do it notwithstanding that, only they don't want to pay for it. Is that the answer?

A. No. I wouldn't say that was the case.

Q. You wouldn't?

A. He has ten days in which to begin operations.

Q. But they start the time during that period of time that you know he is going to have to be assembling his equipment, any contractor that far away, and getting it down to the job and getting organiza-

(Testimony of Levant Brown.)

tion set up for it after you notify him that he is awarded the job?

A. After Mr. Johnson's experience or his equipment record, his plan of operation, he had his equipment in storage in this town here——

Q. He has to get a foreman, has to get men to work, and yet you are complaining that three days after Washington, D. C., accepted [133] that bid he wasn't working on the job?

A. No, I am not complaining that he wasn't working.

Q. No. You are just saying that he should be penalized for it?

A. The desire on the part of Government was to complete the project within the 1937 working season.

Q. That is right.

A. If we had been more severe and made the contract ninety days in order to insure completion it might have been different. What we were trying to do was to avoid just what occurred.

Q. All right. Now on June 28th, I believe that Superintendent Hildeburn arrived on the job with men and a compressor? Isn't that what the diary shows?

A. That is what the diary shows.

Q. The diary shows on June 29th he started to work on the quarry, doesn't it?

A. He started to work with two men on the quarry, one mechanic setting up the air compressor.

Q. Yes. On July 5th contractor brought in a small shovel and cleared the face of the quarry and

(Testimony of Levant Brown.)

started on coyote hole. That is what the diary shows.

A. And the superintendent confirmed that today.

Q. So in less than thirty days from the date the contract was accepted in Washington he was there and was operating?

A. He was there and beginning his preparatory operations.

Q. Preparatory operations. Drilling those coyote holes certainly [134] is not a preparatory operation, is it?

A. Yes. The only productive operation is the production of the actual rock, placing it on the road.

Q. That is right, but of course at least a third of the average contract is what you call preparatory operations, isn't it?

A. Well, there has to be a certain amount of preparatory operations.

Q. That is right.

A. There is no doubt about that.

Q. That is right.

A. The thing the Government engineers were concerned about was that fifty percent of the contract time had elapsed before any rock was actually crushed and hauled out.

Q. That is right. And then I think that the soft rock encountered in this coyoting and the necessity of stopping and getting a material engineer from San Francisco to do anything, would add to that delay in putting rock on the road.

(Testimony of Levant Brown.)

A. It is not my understanding there was any stoppage of work. It is not so indicated in Mr. Wood's diary.

Q. July 11th, Sunday, the diary says "Mailed note to Potter. Rock in quarry turned soft. Looked at other possible quarry sites, one at Bear Creek near Pondosa and at Dixon Flats." You don't think, while they were looking around for other quarry sites due to the fact that your own engineer says the rock in the quarry turned soft, that that would have anything to do with it, do you?

A. If you will read the entry the next day you will notice he says [135] the contractor was continuing with coyote hole.

Q. Certainly. Certainly. But all of that didn't indicate, and wouldn't indicate to you in the contractor's operation when he was encountering a situation like that in the quarry that had been turned over to him by the Government, that it ought to cause any concern or delay in the operation; that he ought to go right ahead as if it were a good quarry?

A. That is part of the contract procedure.

Q. July 12th, "Sent samples of binder and rock to the Bureau of Standards." That is an item in the diary. July 13th, "Contractor laid off other work. Continued work on coyote hole." July 14th, "Rock looks fairly good, though not of the best." July 16th, "Started crosscuts at thirty-foot depths. Completed crosscuts at sixty-eight-foot depth to twenty-two feet on each side." July 17th, "Con-

(Testimony of Levant Brown.)

tractor completed coyote hole with twenty-two-foot crosscuts at 35-foot depth. Don Steele approved quarry if material was mixed." Can you tell me what that meant, that he approved quarry if the material was mixed?

A. You heard Mr. Steele's testimony on that point, I think.

Q. What would be your interpretation of that entry in the diary? You have interpreted a lot of others.

A. My interpretation of that was that Mr. Steele approved the use of the quarry and some of the soft material in the bottom of the pit as long as it met the grading of the specifications.

Q. July 23rd, "Contractor shot quarry. It was a good shot and [136] loosened up lots of material." August 10th, 1937, "Have had contractor close up rolls but still have trouble getting grading." August the 11th, "Grading is closer but still a little under on No. 10." August the 12th, "Broke shaft of rolls." August the 21st, "Poor rock. Closed plant down at 10:00 P. M." August 23rd, "Contractor moved bucket line north to harder rock in the quarry." August 27th, "Closed plant down about 9:00 P. M. and wasted about seventy tons of rock. Changed bucket line due to poor rock in bottom of quarry." Do you think that those conditions didn't materially contribute to the contractor's failure to get that rock on the road in that one hundred twenty days?

(Testimony of Levant Brown.)

A. If you will add up the amount of rock wasted compared to the amount of rock produced you will find it is, oh, approximately one percent.

Q. Yes, but it also shows, doesn't it, the necessity for scraping around and picking out and trying to produce rock that you will let him put on the road from a quarry that never should have been used in the first place, doesn't it?

A. Well, it shows that some selection in the quarry was necessary. There are very few quarries in which you don't have to select the better from the poorer material.

Q. And when the material forms on a roll of a roll crusher and breaks shafts, you think that that material should be run through the crusher?

A. I think the contractor had gotten down into the poorer material [137] underneath the hard material and it was an error in judgment on his part to continue using—to have continued attempting to use that material. I have the very highest opinion of Mr. Johnson's construction experience. I think he is an experienced contractor, but we all make errors in judgment. I think this was a case where an error in judgment occurred.

Q. You don't think there was any error in connection with designating this as a rock quarry satisfactory for that job? A. No.

Q. And you don't think——

The Court: How in your opinion could he have gotten the oil rock at this location, Mr. Brown?

A. Well, there were some twelve to fifteen thou-

(Testimony of Levant Brown.)

sand tons, your Honor, of good rock produced before any difficulty occurred. That was the rock which was on top of the poorer rock. It was shot, all shot up and dropped right in place. It was shattered. The poorer rock, or the better rock was taken off the top. If he had started producing his cover material at that time he certainly could have produced all of the materials required on that end, on the easterly or southerly end of the project, which was only nineteen hundred tons from the twelve or fifteen thousand tons of good material. Subsequently when he got down in the poorer material, that is in the softer material in which, as the superintendent explained, the man driving the coyote hole made thirty feet in a day, if he immediately suspected that was softer material when he got in that particular portion of the quarry he should have [138] expanded his operation to either side. Eventually he moved to the location four hundred feet further up Bear Creek, from which he got, I think, according to Mr. Steele's calculation, some 4,000 tons. Bearing in mind that, there was some twelve to fourteen thousand or fifteen thousand tons of good material taken out before any real difficulty had occurred.

Q. Did you say that there were twelve or fifteen thousand tons taken out before they had any difficulty occur?

A. Before any real difficulty occurred.

Q. Before any real difficulty occurred?

A. Yes.

(Testimony of Levant Brown.)

Q. You heard the contractor's superintendent testify that almost from the start there was so much soft material in it they couldn't produce oil rock. Do you think that they are wrong in that?

A. I think that is a misstatement, if I might go as far as to make it as strong as that.

Q. Uh huh. Well now, on August 10th the Resident Engineer was having trouble with too much soft rock, wasn't he? How many tons had been produced by August 10th?

A. I don't know as there was any trouble on August 10th. They started production on August 9th.

Q. He says he was having trouble getting grading. Isn't that trouble?

A. That was when the plant first began operations. If you will look at the production record you will ascertain that in the first [139] four days of operation he only produced about 2,000 tons, I think it was.

Q. That is August 10th and 11th, having trouble getting grading.

A. If you will go back a few days you will find he started operations along about the 6th or 7th. He started crushing rock, adjusting the plant so as to get the proper grading.

Q. On what dates is that, August what?

A. About the 6th or 7th.

Q. That is about four days.

A. I think the diary indicates that he was plac-

(Testimony of Levant Brown.)

ing crushed rock. He used that material to place it around the plant.

Q. Now on August 12th they broke their first shaft. That is six days after you say they started to operate. Now did they produce 15,000 tons before they broke that first shaft?

A. No. They produced 15,000 tons, fourteen or fifteen thousand tons, about the latter part of August.

Q. So if the shaft broke on August 12th, you don't think it was due to any soft material that they were encountering there?

A. I have no—I can express no valid opinion on that. I did not see the operation.

Q. Well, it was your opinion he could have been producing oil rock, and if there wasn't too much soft in it on August 12th, now, can't you give us your opinion just as well as to what broke the shaft as you can as to why he could have been producing oil rock? [140]

A. No. I don't think I am in a position where I can make a valid reply to that.

Q. And on August 21st, when your man says poor rock closed plant down, that is fifteen days after August 6th, and in that time a shaft had been broken and the plant had been closed down four days for that shaft to be replaced; so we will take four from fifteen and that gives eleven days, and in that first eleven days when they had difficulty grading and were stowing rock around the plant the first few days, it gets us down to a pretty small

(Testimony of Levant Brown.)

length of time in which to produce 15,000 tons of rock before they encountered bad rock, wasn't it, when your own man's diary says poor rock closed plant down?

A. I didn't consider they had had any material difficulty until about the latter part of August. I think if you will refer to the production records you will see he was shut down, the plant was shut down, like the superintendent said, any number of times because of slides in the quarry engulfing the bucket possibly.

Q. That would be an hour or so?

A. Possibly it would not be shut more than an hour or so.

Q. That is right. That is right.

A. But there are any number of notations of that.

Q. But we do know when the shaft broke on August 12th that it took four days to get a shaft and replace it in there. It was shut down four days then. And we do know on August 21st your own engineer, Mr. Wood, says he closed the plant down because of poor [141] rock in the quarry. Now should they have been producing oil rock from that poor rock in the quarry on August 21st?

A. No, I shouldn't think they would be producing oil rock from poor rock.

Q. No.

A. All the testimony has been that they can't produce oil rock from poor rock.

(Testimony of Levant Brown.)

Q. On August 27th the item was, "Closed plant down about 9:00 P.M. and wasted about 70 tons of rock." August 28th, "Closed plant down at 9:30 P.M. due to poor rock." August 29th, "Contractor hauled rock onto Pondosa road." That was poor rock that he was wasting on that road?

A. He was getting that poor material out of the quarry so he could carry on his operations more efficiently, I assume.

Q. August 31st the notation in the diary is, "Closed plant down at 7:30 P.M. because of soft rock. Too much soft for proportion of hard rock. Steele, McCoy and" somebody else whose name I can't make out, "were here and ate lunch with contractor." September 1st, 1937, "Contractor did not place rock on road because there was not enough hard rock available in quarry. Sent for shovel to use in the quarry." September 2nd, '37, "Started erecting plant at Station 870. 60 cat and dozer cleared top of quarry. Continued coyote hole." That is a coyote hole evidently they were putting in at the new quarry they had located, or what do you folks call it? Oh, that is the old quarry. September 3rd, 1937, "Shot quarry at [142] 5:00 P.M. Only about thirty percent of shot was good enough to use. 8,000 tons shot." "9-6-37. Contractor started up at 3:00 P.M. Bay City shovel prospected around for available rock. Broke shaft in rolls at 9:00 P.M."

September 7th, 1937, "Plant started up at 5:00

(Testimony of Levant Brown.)

P.M.” It broke down at that time just from 9:00 P.M. one day to 5:00 P.M. the next day.

September 9th, 1937, rolls again broke. “Plant broke down about noon Broke shaft in rolls. Last night contractor hauled rock from new quarry up Bear Creek. Sent sample of rock of new quarry to District Office.” Is that new quarry he refers to the second face of that same quarry?

A. Yes.

Q. That is the second face? A. Yes.

Q. That wasn’t called the second face at the time the notations were made, then. It was a new quarry to him at the time, I say. September 11th, “Started plant after fixing rolls at 7:00 A.M. Hauled from new quarry.” 9-13-37, “Moved into quarry 2 at about 9:00 A.M. Rock looks pretty good from new quarry thus far. Talked to Denison regarding available rock in quarry. Moved into quarry No. 1 9:00 P.M.”

“9-18-37. Rolls broke down at 4:00 A.M. with only 200 tons to complete at this setup. Let contractor place balance of rock without rolls, wasting part of one-half to one inch rock. [143] This met the grading requirements.”

“9-19-37. There is apparently plenty of hard rock in the upper quarry at Bear Creek for chips but due to roll shaft breaking causing delay of time the contractor elected, with my approval, to make all of chips from plant at Station 870.”

The Court: What does that mean? Where was Bear Creek and where was 870?

(Testimony of Levant Brown.)

Mr. Lichty: Bear Creek is the second quarry.

Mr. Langley: That is the one where all the trouble was.

Mr. Lichty: The Lower Bear Creek and the Upper Bear Creek. Those are the two troublesome quarries. The other was the gravel pit.

The Court: Where was 870?

Mr. Lichty: 870 is the gravel pit.

Q. Now with that record from the diary before you, the trouble in getting hard rock out of that quarry, trouble in meeting grading specifications with it, trouble in shafts breaking, would you say that the quality of this rock had anything to do with it?

A. My reply to that is that the production record stands for itself.

Q. Now what does the production record show? How long did it take him to produce approximately the equivalent amount of material for the road from the gravel pit?

A. He had produced that in approximately twenty-three days, I think. He produced from the gravel pit about a thousand tons a day.

Q. In twenty-three days he did as much work as he had done in how [144] long at the other place?

A. Oh, from August 9th to September 18th; say forty days. That is ordinarily the evaluation of the difference between crushing gravel and crushing rock.

Q. If you have a good rock quarry setup, you

(Testimony of Levant Brown.)

think you could produce from gravel that much faster? A. Ordinarily that is the case.

Q. Ordinarily that is true?

A. That has been our experience.

The Court: Did you move the crusher down to the gravel pit?

A. Yes, sir.

Mr. Lichty: Yes.

Q. Now the notation in the diary of September 3rd, where it says, "Shot quarry at 5:00 P.M. Only about thirty percent of shot was good enough to use. 8,000 tons shot." Would you say that a quarry where you shoot 8,000 tons and only thirty percent of it is good enough to use would be a satisfactory quarry?

A. No. I would say that Mr. Johnson should have moved to one of the other outcrops in that locality sooner than he did.

Q. Did anyone suggest to him that he do that at any time?

A. Mr. Johnson came to San Francisco sometime about the 14th of September, I think it was. He testified that he saw me and that I referred him to Mr. Potter. He had to wait over Sunday. I think he was mistaken as to seeing Mr. Potter. He saw Mr. Dennison. Mr. Dennison is our District Construction Engineer. We have a [145] memorandum in the files from Mr. Dennison dated September 14th covering his conversation with Mr. Johnson that day.

Q. I object to your testifying to anything that

(Testimony of Levant Brown.)

Mr. Dennison has written down as the substance of a conversation he had with Mr. Johnson. Is that what you contemplate doing?

A. The files are under my direction.

Q. I don't care what they are, I am making the objection and I will ask the Court to instruct you that you can't testify to hearsay.

The Court: He has not said what he told him. He just said there was a memo.

Mr. Lichty: Q. You never told Mr. Johnson to prospect for other rock, did you?

A. I don't recall Mr. Johnson's visit. Mr. Johnson said he saw me. I have no reason to doubt but what he did, but I——

Q. You don't remember telling him to prospect for rock?

A. I don't recall Mr. Johnson being in there at all.

Mr. Lichty: All right. That is all.

Redirect Examination

By Mr. Langley:

Q. Well, this calculation that you made took into account the times the plant was down, did it?

A. That was the actual time, the actual time of performance as contained in the records of the project.

Q. The only days that were excluded were Sundays and holidays, [146] weren't they?

A. Well, the Sundays and holidays were not excluded, because they were included in the total calendar days of the time.

(Testimony of Levant Brown.)

Mr. Langley: That is all.

Mr. Lichty: No further question.

(Witness excused.)

Mr. Langley: The Government rests, your Honor.

Rebuttal

Mr. Lichty: Mr. Johnson, will you take the stand again?

HOMER G. JOHNSON,

the plaintiff, was recalled as a witness in his own behalf, in rebuttal, and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Lichty:

Q. Mr. Johnson, you have heard the testimony here relative to the lateness in getting started on this job. On June 3rd you received a letter, did you not, telling you to do nothing on this until they notified you?

A. Yes. I received some copies of the contract and one thing and another, a general specification book, I think, and it said just because they were sending those that was no intimation that I had a contract; that I would be notified when the award was made in Washington and not to do anything until such time as I was notified [147] of that.

Q. And you were notified the first time by telegram, which you received on July 9th?

(Testimony of Homer G. Johnson.)

A. Yes, sir. I actually got the message on July 9th—or June 9th, I should say.

Q. June 9th? A. June 9th.

Q. Now on a job of this size, Mr. Johnson, how long does it ordinarily take for a contractor to get his plant organized, his crew organized, his foremen, and where the job is the distance away that this one was, to move in and begin operation?

A. Well, about sixty days is about as good as I have ever done on a difficult layout like that. And then there was a condition in there also. That was during this period of unemployment through the country. In other words, they said we would have to get our men through, practically all of our labor through the employment office at Dunsmuir, the Government Employment Office at Dunsmuir. Of course we had to give them notice and after so many hours or days of waiting if they didn't furnish anybody then we could go out and get some men. But we were tied down pretty much by that.

Q. You say on a job of this character it is normally about ninety days from the time you get notice to proceed until you actually begin placing rock in place on the road? That is what you mean?

A. Well, I said it is sixty days, about as good as we ever do with [148] that much equipment.

Q. Sixty days?

A. Especially that far away.

Q. Now you said you did have a man down there with a compressor and drills starting your coyote work on about what date?

(Testimony of Homer G. Johnson.)

A. Well, around the last of July, around the 27th, 28th or 29th of July.

Q. Your man, according to the diary——

A. Or June, I should say.

Q. ——arrived about the 28th of June, did he not? A. Yes, about the 28th of June.

Q. So that is about eighteen days after you had notice that you had actually been awarded the job?

A. Yes. In the meantime we had made a trip down and made preliminary inspection. We were doing work here preparatory to getting equipment down there.

Q. Now Mr. Johnson, if this quarry had not developed to be full of this soft stuff and you could have operated as you would have ordinarily in an ordinary commercial quarry, running three shifts a day, as you did, how much rock could you have produced in a day of three shifts?

A. Well, I think we run around, say around 850 to 1100 tons a day out of the quarry, and we done slightly better out of the gravel pit.

Q. You actually did out of that quarry run that much? [149]

A. Yes, when the rock was good and fairly hard and we could keep going.

Q. And there were how many tons of rock required for this job?

A. About 44,000 tons of surfacing and three or four thousand tons of oil rock.

Q. About forty-seven thousand tons?

A. Uh huh.

(Testimony of Homer G. Johnson.)

Q. Then in your opinion forty-five days approximately after you started crushing you could have completed that job had the rock been satisfactory?

A. Yes. We would have had to have allowed a little bit for moving the plant. That would have taken a few days of lost time. But where our greatest difficulty was was the fact we could not produce oil rock while we were running that road rock from the quarry and on account of the rock being too soft to do that. If we could have got out our oil rock then we could have covered all that east end of the road that was surfaced and got the prime coat on and covered it with asphalt, if we had had any oil rock out to do it with.

Q. Now Mr. Johnson, this map that Mr. Steele prepared here, let's look that over. Now he has a designation on here at a spot on a road that is indicated on the map on which the quarry is not located. He has three-tenths of a mile marked there. Where did the stakes that the engineers had set for the road run?

A. They run right over to the old quarry. [150]

Q. They didn't follow the road?

A. Didn't follow this road out here. I don't know whether there was any other road there or not.

Q. But they had actually put their stakes in along the other road into the quarry?

A. Into the quarry.

Q. And in measuring the three-tenths of a mile

(Testimony of Homer G. Johnson.)

from that highway to the quarry you didn't anticipate that you would go along some road where the quarry didn't exist, did you?

A. No; or where the road didn't exist.

Q. This road didn't exist?

A. I don't think it did. I don't know. I don't remember of a road there.

Mr. Lichty: That is all.

Mr. Langley: No questions.

(Witness excused.)

Mr. Lichty: That is our case, your Honor.

Mr. Langley: We have nothing further, your Honor.

The Court: Would you like to argue the case in the morning?

Mr. Lichty: I would like to very much.

The Court: Tomorrow morning?

Mr. Langley: Sure. It is agreeable with me. I am willing to submit a brief. It makes no difference to me.

The Court: You would like to argue, would you, Mr. Lichty?

Mr. Lichty: I don't care; whichever your Honor wants. If your [151] Honor would rather have briefs I will submit briefs. If you would rather hear oral argument I will do that.

The Court: I would rather you lawyers would make the decision yourselves. I will be here and won't be engaged tomorrow morning and if you would like to be heard in oral argument if you will be here I will be here.

Mr. Lichty: I will be here tomorrow then at 10:00 o'clock and be prepared to argue it.

Mr. Langley: Very well, your Honor.

(Thereupon, at 5:14 o'clock P. M., Court was adjourned.)

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, June 13, 1944
10:10 o'clock A. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. John Lichty, Attorney for Plaintiff.

Mr. William Langley, Assistant United States Attorney, appearing for United States of America, Defendant.

PROCEEDINGS

The Court: Proceed, Mr. Lichty.

Mr. Lichty: Your Honor, we are now ready to proceed to prove damages in the case of Johnson vs. the United States of America. I will call Harry Stewart. [153]

HARRY A. STEWART

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. Your name, please?

A. Harry A. Stewart.

Q. What is your position?

A. I am an accountant serving with and for Homer G. Johnson.

Q. And, Mr. Stewart, have you gone over the diary of Joseph E. Wood, the Resident Engineer for the Bureau of Public Roads, which was introduced in evidence in this case?

A. Part of it, yes, sir.

Q. Have you prepared from that diary a summary of the various breakdowns that were reported in the job which was undertaken by Homer Johnson that is under controversy in this case?

A. I have.

Mr. Lichty: May I have the payroll that was introduced in pre-trial? I will ask that Pre-Trial Exhibit 29, I believe it is, be introduced in evidence at this time.

Mr. Langley: Just a minute. Your Honor, I want it identified.

Mr. Lichty: Well, that was the purpose of pre-trial.

Mr. Langley: Nobody identified it there. All they did was hand it in to the reporter.

(Testimony of Harry A. Stewart.)

Mr. Lichty: No. It was identified as the payroll. The man [154] was here.

Mr. Langley: Nobody was put on the stand.

Mr. Lichty: That is right. And I handed it in and I said, "This is the duplicate original payroll from this job." Now if there was any objection the time to object was at pre-trial, not at trial.

Mr. Langley: I think that is the purpose of pre-trial, is it not, your Honor?

The Court: Do you have any doubt of its authenticity?

Mr. Langley: Yes, I do.

The Court: Well, you have your client here. He can certify to it.

Mr. Lichty: Why, surely he can.

The Court: All right. Step off.

Mr. Lichty: You wish me to have him on the stand?

The Court: Yes. Step off the stand.

(Witness withdrawn.)

HOMER G. JOHNSON,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Your name is Homer G. Johnson?

The Witness: Yes, sir.

(Testimony of Homer G. Johnson.)

By Mr. Lichty: [155]

Q. Mr. Johnson, I hand you Pre-Trial Exhibit No. 29. I will ask you what that consists of.

A. Well, this is a certified payroll that was required on the contract. All of those contracts at that time required the contractor to submit a certified payroll each week of how many he had employed and where he employed them and what they were doing.

Q. And these are duplicate originals of that payroll?

A. Yes, those are duplicate originals, and some of them are originals and the duplicate was sent in to the Public Roads at San Francisco.

Q. How often were they sent in?

A. Every week.

Q. And these have been in your file ever since that job?

A. Yes, sir.

Mr. Langley: You say the originals are with the Bureau of Public Roads?

A. Well, some of the originals we kept and some of the copies were sent to them, and then vice versa.

Mr. Langley: Now where is the original, is what I want to know?

A. Well, some of these here are originals and then some of them are duplicates of the originals.

Mr. Langley: Now where did you get the information that you made these up from?

A. These here? [156]

Mr. Langley: Yes.

(Testimony of Homer G. Johnson.)

A. Well, it was made up by the timekeeper.

Mr. Langley: You have no personal knowledge of that yourself, then, have you, of the correctness of those items on there?

A. Well, a great many of them I certified to them. I should have.

Mr. Langley: Well, the information on there was taken off of the timekeeper's reports; is that correct?

A. Well, I signed all the checks.

Mr. Langley: Answer my question "yes" or "no". Where did you get the information that you put on that payroll?

A. Well, the bookkeeper. That time was turned in by the foremen to the bookkeeper, then the bookkeeper made these up and made up the checks for the men, and so forth, and I checked over them and certified the payroll and signed the checks for the men.

Mr. Langley: You were not the timekeeper, were you?

A. I wasn't the timekeeper, no.

Mr. Langley: You were not the bookkeeper were you?

A. No, I wasn't the bookkeeper.

Mr. Langley: And you have no personal knowledge of the correctness of the items?

A. Yes; because I always checked these. If we made a mistake on them we generally were called on the carpet and the things were checked. The time-

(Testimony of Homer G. Johnson.)

keeper got them all together, sat down and checked them over.

Mr. Langley: Who prepared those? [157]

A. A man by the name of Murphy.

Mr. Langley: You didn't prepare them. did you?

A. Part of these. Now another part was prepared by another man. 1938 was prepared by another man, and 1937 was prepared by Murphy and most of the time myself.

Mr. Langley: Did you prepare any of them yourself?

A. No. I didn't do this writing, any of it, myself.

Mr. Langley: No. Well, I object to it, your Honor, on the ground it is hearsay.

The Court: Admitted subject to the objection.

Mr. Langley: I would like to cite authorities: Chaffee & Company vs. United States, 18 Wall. 516; Radtke vs. Taylor, 105 Or. 559. My objection goes that it is hearsay.

The Court: Admitted subject to the objection.

(The document labeled "Payrolls - California Job. Homer G. Johnson. From June - 1937 to Aug. - 1938", so received, having been previously marked Plaintiff's Pre-Trial Exhibit 29, was further marked "and trial".)

Mr. Langley: Now I have one further question. Now you say the original of that was handed to the Bureau of Public Roads; is that correct?

A. During a part of the time. Now I wouldn't

(Testimony of Homer G. Johnson.)

say. During the year of 1937 I think it was our intentions to give them duplicates—to give them originals and we keep duplicates, while in the year 1938 we kept the originals and gave them the duplicates.

Mr. Langley: And this is not an original document, then, is it? [158]

A. Part of it is.

Mr. Langley: Well, I object to the part that is a duplicate on the ground that it is not the best evidence.

The Court: Admitted subject to the objection.

Mr. Lichty: Q. Mr. Johnson, they were all prepared in one writing, were they not?

A. Yes, they were.

Q. The carbon underneath the first sheet, and the second, if it is a carbon, is an exact carbon copy of the original? A. Yes, they are.

Q. If it is an original an exact copy was sent to to the Bureau?

A. Yes, sir. I know that is the way Murphy was preparing them all the time he was on the job.

Mr. Lichty: That is all.

Cross Examination

By Mr. Langley:

Q. Mr. Johnson, are you sure of your answer? Look over that payroll and make sure you are answering that question correctly.

(Witness examines document.)

Mr. Lichty: I don't think it is the intention——

(Testimony of Homer G. Johnson.)

A. It is a little difficult to tell. Some of them look like originals and some look like duplicates, but anyway they were all made from carbons and they are exact copies of one another, or exact duplicates of what was sent in officially to the Bureau of Public Roads as the official payroll. [159]

Q. And this exhibit that you have there is an exact copy of the one that was sent in to the Bureau of Public Roads; is that correct?

A. Well, yes. In other words, they were supposed to be exact copies.

Q. I don't want what it was supposed to be. Is it? Is it, is what I am asking you? Is it an exact copy of the one that you sent in to the Bureau of Public Roads?

A. Well, that is as far as I know.

Mr. Langley: That is all.

Mr. Lichty: That is all, Mr. Johnson.

(Witness excused.)

The Court: Come back.

HARRY A. STEWART,

having been previously sworn as a witness in behalf of the plaintiff, resumed the stand and further testified as follows:

Direct Examination (Continued)

By Mr. Lichty:

Q. Mr. Stewart, have you prepared from the

(Testimony of Harry A. Stewart.)

payrolls and from the engineer's diary a summary of the cost and expense of the repairs to the crusher equipment occasioned by the breakdown of the rolls of the crusher? A. I have, yes.

Mr. Lichty: If it would help the Court any, I have here, not [160] as an exhibit but just to follow his testimony, his preparation.

The Court: I won't need it now.

Mr. Lichty: You don't need it. All right.

Q. First, have you examined the invoices of the cost of the crushers themselves, and the freight on the crushers, crusher rolls?

A. I have, crusher repairs.

Q. What was the cost as shown by Exhibit 30, which we offer in evidence, of these crusher rolls?

A. Do you wish me to give the details, or the total?

Q. Give the details.

The Court: Do you want to make an objection to Exhibit 30?

Mr. Langley: Yes. I will object to it on the ground it has not been properly identified; it is hearsay. It is a receipt. There is no testimony here it has been paid. Anybody could have made up that.

Mr. Lichty: Q. What is Exhibit 30?

A. The cost invoices.

Q. Exhibit 30 consists of bills for the crusher rolls to replace the rolls that broke, and they were placed in that crusher due to the breakdown because of the soft material?

(Testimony of Harry A. Stewart.)

The Court: Well, this man wasn't employed at the time.

Mr. Lichty: No, your Honor, and if at the pre-trial any objection had been made as to their authenticity we would have proved them. [161]

The Court: Well, I am interested in getting along. I am not interested in what might have been done or should have been done. Now just have him sit there and we will have Mr. Johnson identify the documents.

Mr. Lichty: Mr. Johnson, I hand you a bunch of documents clipped together, marked Pre-Trial Exhibit No. 30. I will ask you what these documents clipped together are. Begin right with the first. The first page is what?

Mr. Johnson: The first page is the shaft roll, one of the rolls of the crusher. It was for the roll, crusher roller in that plant that was broke. That is a bill for it. It was bought here at Portland.

Mr. Lichty: Was that bill paid?

Mr. Johnson: Yes, sir.

Mr. Lichty: Was that crusher roll installed in the crusher on the job in question here?

Mr. Johnson: Yes.

Mr. Lichty: Due to the breakdown of the roll?

Mr. Johnson: Yes.

Mr. Lichty: What is the second sheet?

Mr. Johnson: The second sheet was a bill to McCloud River Railroad Company steel machine shop there, and we had to take rolls in there and have them taken apart and get their machine shop to do

(Testimony of Harry A. Stewart.)

the work, putting in, or taking out the old shaft and putting in the new. [162]

Mr. Lichty: Was that bill paid?

Mr. Johnson: Yes, that bill was paid.

Mr. Lichty: What is the next sheet?

Mr. Johnson: The next one is another bill for roll shaft at a machinery house here in Portland.

Mr. Lichty: Was that shaft installed in the crushing equipment on that job?

Mr. Johnson: Yes.

Mr. Lichty: Due to the breakdown of the shaft, due to the soft rock?

Mr. Johnson: Yes.

Mr. Lichty: The bill was paid?

Mr. Johnson: Yes, the bill was paid.

Mr. Lichty: What is the next page?

Mr. Johnson: The next was express on a shaft from Portland down to the job, down to McCloud.

Mr. Lichty: That is the shaft just referred to?

Mr. Johnson: Yes, sir.

Mr. Lichty: That bill was paid?

Mr. Johnson: Yes, that bill was paid.

Mr. Lichty: What is the next sheet?

Mr. Johnson: It is a bill for another shaft for the roll crusher.

Mr. Lichty: Was that to replace a shaft broken on the job?

Mr. Johnson: Yes, sir. [163]

Mr. Lichty: Was the bill paid?

Mr. Johnson: Yes, sir.

(Testimony of Harry A. Stewart.)

Mr. Lichty: The shaft was installed in the crusher?

Mr. Johnson: Yes, sir.

Mr. Lichty: The next sheet?

Mr. Johnson: That is a bill for another roll shaft.

Mr. Lichty: Which was installed in that equipment?

Mr. Johnson: Yes.

Mr. Lichty: The bill was paid?

Mr. Johnson: Yes.

Mr. Lichty: It was necessary, due to a breakdown occasioned by soft rock on that job?

Mr. Johnson: Yes.

Mr. Lichty: The next sheet?

Mr. Johnson: The next sheet is an express bill from the Express Company for shipping a shaft from Feenaughty Machinery Company from Spokane.

Mr. Lichty: That was one of the roll shafts that was installed?

Mr. Johnson: Yes, sir.

Mr. Lichty: The next sheet?

Mr. Johnson: It is a bill for installing shafts there, doing this machine work, of the McCloud River Railroad Company, at various times when the shafts were replaced. The bill was for shafts replaced. [164]

Mr. Lichty: Are these all invoices that were submitted to you, which you have taken from your file?

Mr. Johnson: Yes.

(Testimony of Harry A. Stewart.)

Mr. Lichty: Any objection to the admission now?

The Court: Do you want to cross examine, Mr. Langley?

Mr. Langley: Where are the checks that were issued in payment of these alleged bills?

Mr. Johnson: They are at the office, I presume.

Mr. Langley: Well, I object to it on the ground that, so far as payment is concerned, it is not the best evidence. The receipt does not mean anything. They are hearsay. They ought to have the checks here that paid these bills.

The Court: They are admitted subject to the objection.

(The bills from Feenaughty Machinery Co. to Homer Johnson, etc., so offered, having been previously marked Plaintiff's Pre-Trial Exhibit 30, was further marked "and trial".)

The Court: Now continue this examination.
By Mr. Lichty:

Q. Now Mr. Stewart, what is the total amount of the cost of the roll crusher repairs as shown by these invoices?

A. As shown by the invoices which we have submitted here, the total cost would be \$629.63.

Q. Now have you, from the payroll, figured the time of the men [165] that was involved in making these crusher repairs on the job?

A. Yes. I have scrutinized the payroll for the men who were employed at the plant, which was shut down during the installation of these repairs,

(Testimony of Harry A. Stewart.)

and took an extract from there of their wages, what they were paid per hour.

Q. How many men were employed on the plant there while these repairs were going on?

A. Five.

Q. One plant man. What did he receive per hour?

A. Seventy-five cents per hour.

Q. A hoist man; how much did he receive?

A. \$1.25.

Q. An oiler; how much did he receive?

A. Sixty-eight cents.

Q. Feeder; what did he receive?

A. Sixty cents.

Q. Engineer; what did he receive?

A. Seventy-five cents.

Q. And what was the customary industrial insurance? A. Twenty-eight cents.

Q. A total hour cost of the men at the plant of \$4.31? A. Yes.

Q. How many hours were involved in dismantling and installing these shafts in each case?

A. The minimum so far as I could discover from the payroll at any [166] time was three shifts, twenty-four hours. Sometimes it was more. This I took from the payroll and also from the diary which was introduced.

Q. You figured a cost of how much on each installation? A. The labor cost?

Q. Yes. A. One hundred dollars.

(Testimony of Harry A. Stewart.)

Q. Your total cost of crusher equipment, freight or express, and machine work at the machine shop, and the labor for all of the installations, amount to how much in gross? A. \$1,029.63.

Q. Did you take from Mr. Wood's diary excerpts of the time that the plant was closed down while they were trying to eliminate soft rock from the material that was being produced? It will be your Schedule 2, I believe, or Schedule 4. No, that would be 2, wouldn't it? There is no 2 in mine.

A. I don't have anything in my summary directly on that.

Q. On that schedule you prepared for me you have an item 2, extra costs due to lost time on account of soft rock, \$660.10. Can you tell how that was figured? Oh, \$660.10 was merely the overhead and superintendence?

A. That wasn't in that I prepared.

Q. That is right. That is not in the schedule you prepared.

Mr. Langley: This schedule, are you going to put it in evidence? [167]

Mr. Lichty: No. That is, as I told the Court, merely a resume of his work, prepared for testimony.

The Court: You want one to follow?

Mr. Langley: Well, I ought to have something, or else it ought to go in evidence, one of the two.

The Court: You may have the one he gave me.

Mr. Lichty: I will be very happy to submit this to you here (crossing paper to Mr. Langley).

(Testimony of Harry A. Stewart.)

Q. Then we will skip to the cost of producing oil rock. That is your Schedule 4. From the diary of Mr. Wood did you ascertain when the crushing operations at the gravel pit for the production of everything but oil rock ceased?

A. From Engineer Wood's diary I noted that under date of October 22nd, 1937, he had this notation: "Contractor completed running oversize that was stockpiled, through the plant."

Q. How long did the crusher and the plant operate at the gravel pit in the fall of 1937 subsequent to October 22nd?

A. It operated from October 23rd through November 4th, inclusive—including both dates.

Q. Have you from the payroll ascertained the cost of operation between October 23rd and November 4th?

A. I verified the summary which I found in the records from the payroll.

Q. What was the cost of operation during that time as shown by the payroll? First, just for labor and industrial insurance. [168]

A. For the labor \$9.44 per hour.

Q. And did you figure how many hours they operated during that time?

A. 192 hours of operation during that period.

Q. At \$9.44 an hour?

A. For the labor and industrial insurance.

Q. Yes. Now what is the usual and customary rental of the equipment that was being operated at that plant during that time?

(Testimony of Harry A. Stewart.)

A. Currently the custom is on rentals for the second shift of operation to charge a rental rate fifty percent of that charged for the first shift.

Q. And what are the amounts of the rentals per hour of the various equipment on that job for one shift?

A. The total for rentals and supplies, \$21.76 per hour for the first shift.

Q. Now what equipment does that cover?

A. It includes the shovel, trucks, four trucks altogether, and includes the crushers and screens of the plant.

Q. And you say the customary rental is fifty percent for the second shift—fifty percent of the first shift?

A. Yes, sir.

Q. That would make it \$32.64 for a day of two shifts? In other words, \$10.88 and \$21.76? That is an hour, rather?

A. Yes.

Q. \$32.64 per hour makes it? In other words, it would be \$21.76 [169] for eight hours and \$10.88 for eight hours?

A. The average hourly operating cost during that period was \$25.76, when you average the first and second shifts.

Q. When you get \$21.76 for the hours for the first shift and \$10.88 for the second, that makes \$32.64. Divide that by two gives \$16.32 an average per hour, does it not? (pause) \$16.32 just for rental, and you add the labor cost to that?

A. Yes, but you don't—you take fifty percent of that for the second shift.

(Testimony of Harry A. Stewart.)

Q. That is right. That makes \$16.32 an hour on the average for just rental, and add to that the \$9.44, which gives you \$25.76. It is on the last sheet.

A. Yes; that makes \$25.76. According to my computation, the average hourly rental cost would be \$16.32 per hour.

Q. And the labor cost?

A. Would be \$9.44 added to it.

Q. The total cost of labor and rental per hour is what? A. \$25.76.

Q. It operated 192 hours in just producing the oil rock after the shutdown for the material that had been stockpiled? A. Yes, sir.

Mr. Lichty: You may take the witness.

Cross Examination

By Mr. Langley:

Q. What was the total on that last item? [170]

A. The total of the 192 hours?

Q. The total cost, as I understood it?

A. Yes, sir.

Mr. Lichty: \$4,945.92.

Mr. Langley: Well, are you going to amend your complaint, then?

Mr. Lichty: I have asked, yes, in the complaint to change the figure on page 5 of the complaint, paragraph XIV, where they allege that the additional cost of producing oil rock from the gravel pit is \$1,467.84, I ask to have that figure deleted and to interline \$4,945.92.

Mr. Langley: No objection to his amendment.

(Testimony of Harry A. Stewart.)

The Court: Will you make that amendment, Mr. Clerk. They will give it to you afterwards. It is an interlineation. They will give it to you afterwards.

The Clerk: All right.

Mr. Langley: Q. Now, let's see. As I understand it now, you have testified about two items of damages: about the breaking and the cost of the roll shafts that broke, and about this extra cost of hauling oil rock; is that correct?

Mr. Lichty: Not of hauling oil rock.

Mr. Langley: Producing oil rock.

The Witness: Producing oil rock.

Q. All right. Now let's talk about the first one here. I wish you would take your payroll here. I want you to understand this, [171] Mr. Stewart: I am not questioning your actual cost. What I am questioning is your segregation. Now explain to me, please, and the Court, how from this payroll that you have here you segregate the cost. Will you do that? Now use the payroll.

Mr. Lichty: Hand him the payroll, Mr. Bailiff.

A. I think I testified that I verified this or made this up from the timekeeper's summary which I found in the files and the payroll. I took his summary and verified his summary from the payroll.

Mr. Langley: Just a minute. Then I object to all of this man's testimony, your Honor, on the ground it is hearsay. He is testifying from something that is not in evidence here, a timekeeper's diary or whatever it is. Where is that?

(Testimony of Harry A. Stewart.)

The Witness: I have it here among my papers.

Mr. Langley: Well, let's see it.

Mr. Lichty: Is that what you are referring to (passing paper to the witness)?

The Witness: Yes, sir.

The Court: Mr. Bragg, Mr. Langley wants this piece of paper.

Mr. Langley: Mr. Bragg, will you hand this to the witness.

Q. Where did you get the information that you made that up with?

A. That I made this from?

Q. Yes, sir. A. I didn't make that.

Q. Who made it? [172]

A. This was made by the bookkeeper on the job.

Q. What is the bookkeeper's name?

A. Mr. Murphy.

Q. And your testimony is that you made the segregations from that last document that was handed to you, plus the payroll; is that correct?

A. I verified it from the payroll.

Q. But you have no personal knowledge as to accuracy of that last paper that was handed you? Now you used——

The Court: Wait and see just what he said.

A. I verified the payroll elements of it from the payroll.

Mr. Langley: Q. Yes, and you were receiving it from somebody else's figures, not your own, weren't you?

(Testimony of Harry A. Stewart.)

A. Well, the payroll figures are certainly somebody else's. They are not mine.

Q. All right. You explain to us from all the documents you have there how you made your segregation so as to arrive at this analysis that you have there.

A. That has to do with the crusher reports.

Q. Yes; how you show that the five men that you claim are shown on that payroll worked on the crusher, worked on fixing the roll shaft on the particular day involved.

A. All I can show is that these men were the plant men which were employed at the plant at that time.

Q. That is correct. [173].

A. And the plant was not in operation, of course, while it was broken down.

Q. In other words, you cannot show from the payroll records and the information you have there, that the five men, or whatever men you were talking about, actually did work on the roll shaft repair; is that correct?

A. I can only say that these were the plant men employed at the plant when it was operating. That is all I can say, as shown by the payroll.

Mr. Langley: Then I object, your Honor, to this man's testimony, on the ground it is hearsay. It is based on supposition. He has no records there which show that these particular five men were actually employed in the work that he says they were employed on. He has jumped at a supposition they

(Testimony of Harry A. Stewart.)

were employed there, and because they were not doing some other work then they must have been working on the roll shaft. That is not proof of damages.

Mr. Lichty: We will tie that up, your Honor, with the foreman's testimony.

The Court: That goes to its weight.

Mr. Langley: Q. Mr. Stewart, can you tell us how you made your cost segregation on the payroll?

A. The cost of what?

Q. Well, the cost of anything on the payroll. How do you segregate the cost? You have got down there a man's name, how many hours he worked and how much you paid him. How do you show on the [174] payroll he did the particular type of work?

A. The payroll shows whether he was a blade operator or a roll operator, or a crusher man or engineer, or hoist man. The payroll shows that.

Q. And that is the way you make your cost segregation, then, is it?

A. Yes, sir.

Q. Do you know where the original time sheets are, Mr. Stewart?

A. Payroll sheets?

Q. The original time sheets. The original payroll sheets or time sheets or whatever you want to call them.

A. As I understand it, at least part of these are the originals.

Q. I mean the original time sheets, what the timekeeper keeps.

A. Well, this is only hearsay, but I talked with the foreman on the job and he said *he* made those things up each night themselves.

(Testimony of Harry A. Stewart.)

Q. From the timekeeper's reports; is that correct?

A. He was, you see, timekeeper; he put down here himself each evening for his report to me.

Q. In other words, then the timekeeper prepared that payroll then; is that correct?

A. That is it.

Q. Johnson testified he prepared it?

A. Oh, no.

Mr. Lichty: Oh, no, no. I think that is a misstatement, your Honor; and it is argumentative anyway. [175]

Mr. Langley: Q. When does it show that the timekeeper came to work on the job, on the payroll there?

A. The part which I am talking about, that was kept that way, was in the summer of '38 when the job was completed.

Q. We are talking about '37, when this roll shaft broke, and so forth.

A. '37? I don't know. I haven't talked with anybody who helped make up the original payroll.

Q. Do you know where the original cost distribution sheets are? A. No.

Q. Do you know whether there are any original cost distribution sheets?

A. No, I don't know whether there are any or not, except this distribution sheet here by Mr. Murphy, as I mentioned before, is one of them.

Q. Now you are an accountant. If there are no

(Testimony of Harry A. Stewart.)

original cost distribution sheets how did the time-keeper make his distribution of how these men worked?

A. The payroll shows where they worked.

Q. It shows what their job was, not where they worked. All that payroll is, it shows that a certain man was employed as a blade worker, something like that, just his title. That doesn't show where he worked, does it?

A. It certainly shows he would be working on the road, not in the plant, and if he was a crusher man he would be working at [176] the plant, not out on the road someplace.

Q. So you make your entire distribution upon the label that is made on that man's distribution on the payroll; is that correct?

A. That is what I have done.

Q. That is the basis for your cost distribution?

A. Well, from work I have done, that is very well verified as shown on the payroll.

Q. Mr. Stewart, did you attempt to determine the separate costs for pouring and crushing, or was the entire pouring and crushing cost kept as an item of cost of crushed rock in the bunkers?

A. I didn't follow your question clear through.

Q. Did you attempt to determine the separate costs for pouring and crushing, or were the entire pouring and crushing costs kept as one item of cost of crushed rock in the bunkers?

A. Between quarrying and crushing I didn't attempt any breakdown, no.

(Testimony of Harry A. Stewart.)

Q. Well, now, isn't the extra cost for the pouring and not for the crushing?

A. That is something I am not informed on. I wasn't on the job and that is something I could not answer.

Q. How long have you been employed by Mr. Johnson? A. Two years.

Q. You are familiar with the contracting business, I suppose?

A. Just what I have learned in that time. We haven't run a job in that time. [177]

Q. You were not employed by him in 1937 and '38, then, I take it? A. No.

Q. Now wasn't the contractor paid \$2.00 per ton for his producing and placing the cover material on the road?

A. I would just have to verify that from the contract. I don't know.

Q. And if that is true he was paid \$2.00, whatever extra cost was involved in it?

A. What material is it you are talking about, oil rock?

Q. I am talking now about the increased cost of the oil rock.

A. As I said before, I hadn't been on the job, but from what I have been able to learn this oil rock is a by-product of normal crushing operations and if things had been normal the oil rock would all have been on hand when they were ready to use it, but the oil rock, as I understand it, could not be made out of this quarry. Therefore, when they were

(Testimony of Harry A. Stewart.)

ready to use the oil rock they had to run an operation for 192 hours there in order to produce it and run and waste a lot of rock that wasn't necessary.

Q. The point I am getting at is that the contractor was paid \$2.00 a ton. Now then, you are claiming increased cost. If he is already paid \$2.00 a ton how do you account for the increased cost?

A. Well, we have got to get down to—we have got to be definite here. Increased cost of what?

Q. Producing the cover material. [178]

A. This oil rock?

Q. Yes.

A. All right. It comes back to just what I said. If the quarry had been a normal quarry and the rock had been normal, the oil rock would have been a by-product of the operations and there would have been no extra cost; they would not have had to run the last 192 hours that they ran; but it wasn't. They could not make the oil rock from what was available in that quarry.

Q. Well, they had to make it anyway down there at Station 870, didn't they?

Mr. Lichty: I believe, your Honor, that is argumentative. I don't believe it is getting anywhere on the thing. We have our position and he has his. I object to the form of the question, that he is getting argumentative with the witness.

Mr. Langley: Q. Mr. Johnson's original claim charged 48 hours. Now you are charging 192 hours. How do you explain that?

(Testimony of Harry A. Stewart.)

A. Why this complaint was amended to that figure?

Q. Well, you are now claiming 192 hours. How do you justify that?

A. Once more it comes back to what I said. The entire operation was from October 23rd to November 4th, which was necessitated by the failure of the quarry to produce this oil rock. Therefore—

Q. How do you get—oh, excuse me.

A. Therefore for that period, October 23rd to November 4th, inclusive, they ran two shifts a day, with the exception of one Sunday, I think, to produce this oil rock that was required for [179] the surface, and in order to get this oil rock out they had to process a lot of rock, a lot of gravel, which would not answer the specifications and was wasted. So that the whole operation was made necessary by the failure of the quarry to produce the required oil rock. Of course, I wasn't there but you are asking me and I am telling you what I learned by inquiry.

Q. Well now, how do you get that 120 hours off of the payroll?

A. One hundred ninety-two?

Q. 192, yes.

A. Well, the payroll shows the plant in operation 192 hours. The plant men were all on duty those hours.

Q. And if the payroll shows that a blade man—if a fellow was employed as a blade man, you are

(Testimony of Harry A. Stewart.)

just assuming that he worked as a blade man during that time; is that correct?

A. Yes. But the blade men's cost didn't enter into this. This is plant cost.

Q. All right. Give me the title of some man that worked in the plant, then.

A. Well, engineer, for example; crusher man.

Q. All right. If you have got a crusher man there you are taking it for granted then that he was working in the crusher; isn't that correct?

A. I am.

Q. It is possible, isn't it, that he might have gone to town that day to do an errand for Mr. Johnson, or something like that, isn't [180] it?

A. Normally that is not done. But once more I will say I wasn't on the job.

Q. And we haven't anybody here that has testified that is correct. A. I don't know

Mr. Langley: That is all.

Mr. Lichty: That is all, Mr. Stewart.

(Witness excused.)

Mr. Lichty: Mr. Hildeburn.

The Clerk: Will you state your name, please?

Mr. Hildeburn: Harry Hildeburn.

HARRY HILDEBURN

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lichty:

Q. Mr. Hildeburn, you testified in the former trial here, did you not? A. Yes.

Q. You were the superintendent for Mr. Johnson during 1937? A. That is right.

Q. The question has arisen as to the operations on the job there subsequent to October 22nd, 1937. What was the only operation being carried on there after October 22nd, 1937? [181]

A. The production of oil rock.

Q. Now the entire payroll, then, between October 23rd and November 5th, would be for pay for men who were engaged in that operation?

A. Yes.

Mr. Langley: Now just a minute. I object to that on the ground it is hearsay. The payroll speaks for itself. Now he has got the payroll in he is going to back it up.

Mr. Lichty: Which one are you going to hang on? You say we can't use the payroll because the man who made it is not here. Now you say the man who worked on the job can't testify.

The Court: All right. He has had his say; now you have had your say. Now continue, subject to the objection.

Mr. Lichty: Q. You were there, were you?

(Testimony of Harry Hildeburn.)

A. Yes, sir.

Q. Was the entire payroll between October 23rd and November 5th payroll for the production of that oil rock?

A. Well, if the payroll showed men working around the plant I would say yes, although we might have done some little odd jobs out on the road, like opening up a ditch or something of that kind, but had we done so the payroll would have showed road work, I am quite sure.

Q. Will you take the payroll and examine that period between October 23rd and November 5th and tell us how many men were working continuously during that period in and around the plant and the pit [182] producing oil rock?

Mr. Langley: I—

The Court: Do you want to object?

Mr. Langley: I just wonder, are you going to testify from your independent recollection, or are you going to read it off that payroll?

A. I certainly would have to read it off the payroll. I could not testify to something when I wasn't there.

Mr. Langley: I object to his testimony, then, as being incompetent, irrelevant and immaterial. It does not add to anything here. He didn't prepare the payroll. He doesn't know it is accurate or not. All he is doing is reading what somebody else entered.

The Court: He may answer subject to the objection. Will this take some time?

(Testimony of Harry Hildeburn.)

Mr. Lichty: Just run over the sheets from day to day to the end.

The Witness: Well, I haven't seen the payroll for seven or eight years.

The Court: Let him take it in the back of the room there and go on with something else.

Mr. Lichty: I will withdraw the former question.

Q. How many men, Mr. Hildeburn, were operating in the gravel pit and around the crusher producing this oil rock at a time during this operation? [183]

A. Well, I don't know.

Q. Well, you would have on the crusher—what would you have on there?

A. Well, there would be eight or nine men, I would say. But that is a long time to remember how many men we had. There would be a shovel operator, an oiler, and three or four men around the plant, and truck drivers, a roustabout and one thing and another. I would say as a rough estimate it would be anyhow ten men, if not more. I could look on here and find out how many.

Q. All right. Just look on there and find out how many. Just pick one out and see how many men were being paid the first day, October 23rd. We will see how many men were being paid on that work that day.

A. October 23rd? Well, I count thirty men here but I can't find just where it shows what they were doing.

(Testimony of Harry Hildeburn.)

Mr. Langley: That is just the point.

Mr. Lichty: May I see that a minute, Mr. Hildeburn?

(The witness passed document to Mr. Lichty.)

Q. Is there a column on this payroll that is kept to show the job on which the man is occupied?

A. Well, I didn't see any. That is what I was looking for.

Q. What is this column here (indicating)?

A. Oh, yes. But it is not very specific. Yes; it shows foreman, laborer, several laborers, shovel operator, truck drivers, and another foreman, laborer and truck drivers; and it also shows [184] roller operator. I don't know what the roller operator would be doing at that time.

Q. I believe he worked for one or two days after the 22nd, didn't he, after the distribution on the road had stopped?

A. That would be possible.

Q. All right. Look over now about to the 27th, we will say. Turn to that and see who was working at that time.

A. It seems to jump from the 23rd to October 30th.

Q. All right. October 30th, then.

A. It shows seventeen men working on that date.

Q. What were the occupations as designated?

A. Truck driver, blade operator, laborer, foreman, laborer, timekeeper, truck driver, truck driver,

(Testimony of Harry Hildeburn.)

laborer, laborer, crusher man, truck driver, laborer, truck driver, truck driver, shovel operator.

Q. Now what was the work being done at that time?

A. Well, I think we were producing oil rock.

Q. Don't you know you were?

A. Well, I heard the testimony of Mr. Stewart here and he testified that we were making oil rock at that time, but that has been six years ago and I think we were making oil rock all right in the neighborhood of that time, but to say that we were making oil rock on that particular day, why, it would be kind of hard for me.

Q. Do you know what happened in that job toward the end of that season, how many days approximately it took you to operate? [185]

A. We were somewhere in the neighborhood of a month and a half in making oil rock. I do remember that.

Q. And as you had crushed the ordinary grade material from that gravel pit you were able to stockpile some oil rock, were you not?

A. Yes, and we stockpiled—well, as we got out the road material we stockpiled oversize boulders for the purpose of making oil rock and then after the road operation was finished we crushed these boulders and made oil rock out of the boulders, but there wasn't enough boulders to complete the oil rock and we had to go back and run additional rock and segregate more boulders to get enough of the large size rock to make the oil rock product

(Testimony of Harry Hildeburn.)

and we wasted what would ordinarily be road material in order to do that.

Q. I am reading you from Exhibit No. 20, which purports to be, and I think it has been identified as, the diary of Mr. Wood, the engineer on the job, and on page 18 I believe it is here it says, "10-19-37. Completed blading and rolling top course. Contractor decided he would have to wash chips, so told him to wash balance of coarse aggregate too and not to stockpile any more of it on the road until it is washed. 10-20-37. Contractor continued on setting up water plant. Ran oversize rock through the plant to make oil rock. Started to oil but ground was so cold that the oil set up before the rock could be placed on it. Told contractor that we would not oil any more this year. Con- [186] tractor has 160 tons of coarse aggregate piled at 1423 and 350 tons at 1226. Told contractor that we would try penetration oil on October 25 if weather permitted. 10-21-37. Contractor ran oversize reject rock through the plant. Worked two shifts. Mr. Morrison went over the job and discussed specifications of this job and the next section. 10-22-37. Contractor completed running oversize that was stockpiled through the plant and continued washing. 10-23-37. Contractor placed a certain number of gallons of M.C. 1 from Station 1100 to 995. The oil was placed", and so forth. That is immaterial. "10-24-37. Sunday. Contractor blotted oil today and continued washing and stockpiling oil rock. I told him that if he didn't lay off sometime during week that he would have to not

(Testimony of Harry Hildeburn.)

work Saturday. He agreed to do this. Hauled eight loads of rock dust to blot road where oiled. 10-25-37. Contractor started running plant one shift, running pit gravel through to make oil rock. Ran stockpiled material through washer second shift. Material that was made from gravel pit was washed and stockpiled." Now from that date to 11-4-37, "Contractor decided to run about 200 tons extra of one-half inch rock. Will stop his time today and make out his estimate. Ran oversize through plant and made smaller rock out of it. Note: Yesterday's run of 150 tons was taken from U. S. Land and not from the McIntosh property. 11-5-37. Worked on estimate and reports for closing up job. Homer G. Johnson was on job. Started to dismantle plant and move equipment out." [187] Now from these notations refreshing your recollection of the job and the operations of that year, will you be able to testify definitely as to what you were doing between October 23rd and November 5th?

A. Well, I would say we were making oil rock.

Q. Now Mr. Hildeburn, had the rock in the first quarry setup at or near Station 1239 been suitable rock for oil chips, would that final operation between the 23rd of October and November 5th have been necessary at all? A. It would not.

Q. Mr. Hildeburn, when the crusher roll shafts would break you were foreman on the job at that time when they were breaking in that rock quarry?

A. Yes.

(Testimony of Harry Hildeburn.)

Q. It has been testified there were always on the payroll a plant man, a hoist man, an oiler, feeder and engineer, and that those men were paid for at least three shifts in each instance of a breakdown while the plant was being repaired. In your opinion is that a reasonable estimate of the time involved?

A. Yes—

Mr. Langley: Just a minute.

A. I would think so.

Mr. Langley: We object to that on the ground this is an opinion. Now we are trying to get costs here.

A. Well, I would say yes, that we have employed them and paid [188] those rates.

Mr. Langley: You are making that statement, are you?

A. I will make that statement definitely.

Mr. Lichty: Q. Just give the Court a picture of the labor involved in the taking out of one of those shafts and putting one in.

A. Well, I don't know. It is kind of hard to give a picture of it. But this roll is surrounded by a lot of machinery and the shaft runs through the center of the roll as an axis. The roll turns on it and there is a great deal of dismantling to do to get the old shaft out and then it is so constructed that it is pretty hard to line it up. It is lined up with wedges and one thing and another; not a few wedges but dozens of wedges, to put this shell back on the rolls, and it makes quite an operation to put in a new shaft. It takes—well, with good luck it

(Testimony of Harry Hildeburn.)

could be done in a day, but we very seldom ever did it in a day. Sometimes two days I think it would take us to change that shaft.

Q. What was the necessity for machining or taking it into a machine shop? To have new bearings pressed on, or what?

A. Well, yes, I expect so. I don't recall. I think we had to take it in to have the bearings pressed off of the old shaft. I don't recall having the new ones pressed on, but maybe we did.

Q. But you do remember it had to be taken into the machine shop?

A. Yes, it had to be taken into the machine shop— [189]

Q. To have the old ones pressed off?

A. We had permission from the lumber company to use their shop at McCloud.

Mr. Lichty: You may take the witness.

Cross Examination

By Mr. Langley:

Q. Can you look at the payroll there and tell how much it cost Mr. Johnson to fix this roll shaft in labor? Can you tell from that payroll?

A. No, I don't think so.

Q. It is impossible to tell it, isn't it?

A. Yes. On this payroll I would say it was impossible to tell it, but I have just testified that it took from a day to two days with all our crew.

Q. We are not criticizing your statement on that but what we are trying to get at is the specific cost,

(Testimony of Harry Hildeburn.)

and you can't tell that from the payroll there, can you?

A. On that particular item I don't think you could tell that, no.

Q. Let me ask you this question. While this shaft was being worked on in the shop what were the five or six other men doing?

A. Oh, they were doing something, or else they were laid off.

Q. Yes. A. One of the two.

Q. Sure.

A. They wouldn't be standing around there doing nothing. [190]

Q. So if the payroll shows here there is a laborer a day each on the certain day the roll shaft was broken, that doesn't mean the laborer was actually working on the roll shaft the full eight hours, does it? He might be laying around?

A. Well, I don't know definitely it would mean so, but it is quite likely he was doing something that pertained to the breakage of that roll.

Q. But you can't tell from the payroll, can you?

A. No, you couldn't tell it from this payroll.

Q. And you can't tell from the payroll when you were making oil rock, can you?

A. No, I don't believe you could.

Q. Now Mr. Hildeburn, look on the payroll there, we will say the 25th day.

A. This is in 1938?

Q. October, 1937. I think you had it out there, didn't you?

(Testimony of Harry Hildeburn.)

A. The 25th day? No. It jumped from the 23rd I think to the 30th.

Q. All right. Then take the 30th. You had the 30th?

A. Yes, sir. From the 23rd then it seems to jump to the 30th.

Q. Now I believe you testified you were working in the gravel pit then. I think that is correct. Everybody agrees on that. A. Yes.

Q. Did you use a powder man when you were working in the gravel pit? Did you use any powder man then? [191]

A. No, I think not, as a powder man.

Q. Yes. And what does it say on there on October 30th, 1937? Under that caption it shows powder man eight hours, doesn't it?

A. Well, I find his name. His name was Avelis.

Q. Right up at the top, about the third one down from the top.

A. I guess I am kind of blind. I can't find it.

Q. He is the third name down?

A. The third name down is McAllister, a laborer. This is on October 30th.

Q. Well, I may be looking on the wrong page. Of '37? Have you got '37 or '38?

A. This is 1937.

Mr. Langley: Could I approach the witness, your Honor?

The Court: He doesn't know.

The Witness: Avelis don't show on here at all, the powder man.

(Testimony of Harry Hildeburn.)

(Mr. Langley here approached the witness and indicated to the witness.)

The Witness: That seems to be a different page.

Mr. Langley: Q. It is exactly the same page testified to. He testified that they were exact duplicates.

A. The names are not the same at all.

Q. I know. That is just what I have been talking about.

A. Maybe the one you have is wrong, Mr. Langley.

Q. I know, but he testified they were all true and correct. We [192] have got the original.

The Court: Well, that is what you no doubt have; you say you have; but—

The Witness: Adams. Well, the date seems to be wrong. That is October of—October 23rd all right, but the date on the head of the sheet is wrong.

Mr. Lichty: May I see the sheet? (Paper passed to Mr. Lichty). May I see your sheet that you say is a copy of this one.

The Witness: October 23rd. Something is wrong I just looked at the names. The names seem to match with that date. Well, they do match as a matter of fact, as far as I can tell.

The Court: All right. You can check that later.

Mr. Langley: Q. All right. Mr. Hildeburn, when was it that the first roll shaft broke? About August 3rd, wasn't it, something like that, according to your best recollection?

(Testimony of Harry Hildeburn.)

A. I couldn't say.

Q. Well now, when did you first run into soft rock when you were crushing there?

A. It broke not a great while after we started crushing.

Q. Did you run into it as early as August 12th?

A. I just couldn't testify as to dates at all.

Q. How long have you been employed by Mr. Johnson?

A. Well, I haven't been employed with Mr. Johnson for the last four years but I was employed with him for, I believe for twelve years. [193]

Q. 1936 and '37 you were employed with him, were you?

A. Yes, sir.

Q. Were you familiar with the types of equipment that he had?

A. Yes.

Q. Well, how many 15-inch by 36-inch jaw crushers did he have?

A. Two.

Q. Two. And how many 3-foot cone crushers did he have?

Mr. Lichty: We object to this, your Honor, as not proper cross examination.

The Court: He may answer.

A. Two.

Mr. Langley: Q. And how many 20-inch by 40-inch Pioneer roll crushers?

A. One Pioneer.

Q. Just one Pioneer?

A. Yes.

Q. Do you know where that 20-inch by 40-inch Pioneer roll crusher was before it came down on the job there?

A. No, I do not.

(Testimony of Harry Hildeburn.)

Q. Where were you before you went on the job down there?

A. I came from some other job but—

Q. Was it a job for Mr. Johnson?

A. It must have been. I was working for him. I just can't say offhand what job it was that I came from. Now possibly that was early in the year, I might not have come from any job, as a matter [194] of fact, because I seldom worked in the winter time and it wasn't often that we had work.

Q. Were you on this job he had up at Chehalis?

A. Yes.

Q. You came from that job down to the job in California; isn't that right.

A. Well, possibly so, but I am not sure about that.

Q. And the equipment that he used on the job there came from this job up in Chehalis, didn't it?

A. No, I don't think so. I don't believe it did. As I recollect, it came from the warehouse, but I wouldn't testify to that because I don't know. But that is my recollection.

Q. Do you know when that job in Washington was finish?

A. No, I don't.

Mr. Langley: That is all, Mr. Hildeburn.

(Witness excused.)

HOMER G. JOHNSON,

the plaintiff, was thereupon recalled as a witness in his own behalf and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Lichty:

Q. Mr. Johnson, were you down at the job in October and November, 1937, when they were crushing oil rock at the gravel pit? A. Yes. [195]

Q. Approximately how many days were they engaged at that gravel pit in doing nothing but producing oil chips?

A. Well, it was, according to my memory, about three weeks, but in comparing that with Wood's diary, the diary that was Wood's, it says that we started in on the oil rock there on the 22nd of October and we had finished everything on the 4th or 5th of November.

Q. Now you had been preparing, crushing oil rock prior to that?

A. Yes. When we went into this gravel pit we started saving all—instead of saving the coarse rock and grinding it into oil rock, for a little while we started up crushing the road rock and we were not just quite ready for the oil rock. There were screens and we didn't want to try to get so many things going at once and we continued on the road rock while we were working on the screen and while doing that we put these pebbles and oversize rocks in a stockpile; then a little later we got things going. We run oil rock as long as we were running

(Testimony of Homer G. Johnson.)

road rock. When the road rock was finished we went out, got these pebbles, ground them up. Then we got the gravel ground up and had to waste what we had been using for road rock before in order to get oversize out to make oil rock, because oil rock specification would not allow us to make it out of that fine gravel.

Q. So the entire operation in the gravel pit between October 23rd and November 5th was in the production of oil chips?

A. Yes. That was all that was done in the gravel pit, was just [196] to make oil rock.

Q. Now had you been able to produce the oil chips at the first quarry near Station 1239, would you have been compelled to run that extra operation at all?

A. No. There practically wouldn't have been any of that operation from October 22nd on, because all the oil rock we would have needed would have been out when we got out the gravel for the surface—by the time we got out the gravel for the surfacing.

Q. Now have you figured out the extra cost of hauling the oil rock from the gravel pit compared with what the haul would have been from the rock quarry?

A. Yes.

Q. I will hand you this document to refresh your recollection.

A. Yes. This item of \$956.48 was——

Mr. Langley: Now just a minute. I would like

(Testimony of Homer G. Johnson.)

to see the document you are testifying to. If he is going to testify to these things let's have them go in evidence.

The Court: Why don't you put that in? Mr. Langley wants it.

Mr. Lichty: All right. We will put it in gladly (passing paper to Mr. Langley).

Q. That was a copy of the claim you submitted to the Government once on this operation, I believe, was it not? A. Yes.

Mr. Langley: Where did you get the figures that you made this up from? [197]

The Court: Mark it as an exhibit.

(The carbon copy of typewritten instrument headed "Contract #77-D4&E4 Mt. Shasta-Mt. Lassen Highway, summary of extra costs of contract operations due to Quarry Failure at Station 1239", so offered, was marked Plaintiff's Exhibit 31.)

Mr. Langley: Did you prepare that yourself, Mr. Johnson?

Mr. Lichty: What is it now? What is the number of it?

The Reporter: Plaintiff's Exhibit 31.

Mr. Lichty: All right. That has been identified. Now answer his question. Did you prepare that?

A. I didn't. I only assisted in the preparation; not hauling. Why, I checked on that on account of I wanted to be sure that the bookkeeper that had made this up didn't make any error in the hauling,

(Testimony of Homer G. Johnson.)

so I checked that with him at the time this was made out.

Mr. Langley: What did you check it with?

A. We had a chart. In other words, he had the stations where this oil rock was put, and then he made up a chart showing just how it would be, how the cost would be in hauling from the quarry.

Mr. Lichty: I ask to have this chart marked for identification also.

The Court: Mark it. Put the chart in evidence.

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(The chart so offered was thereupon marked Plaintiff's Exhibit 32 for identification.)

Mr. Lichty: The chart is Exhibit 32, is it?

The Reporter: Yes.

Mr. Lichty: Q. Is that the chart you are referring to, Mr. Johnson?

A. Yes, this is the chart.

Mr. Langley: Did you prepare that chart?

A. No, I didn't prepare this. The bookkeeper got it up.

Mr. Langley: I object to it as not properly identified, incompetent, irrelevant and immaterial. If he wants to——

The Court: Admitted.

(The chart so offered and received, having been previously marked for identification, was marked received as Plaintiff's Exhibit 32.)

Mr. Lichty: Q. Did you check it with the bookkeeper? A. Yes, I checked it.

(Testimony of Homer G. Johnson.)

Mr. Langley: What did you check it with?

A. With the engineer's map and specifications.

Mr. Langley: Where is that?

A. It is in here. You have already got it in your exhibits.

Mr. Lichty: It is in evidence.

Mr. Langley: Then you didn't prepare that exhibit? The other [199] one you have got in your hand, you didn't prepare that yourself, did you?

A. I checked this particular item both from this and on this other at the time the bookkeeper made that up.

Mr. Langley: We object to it on the ground it is hearsay, your Honor.

The Court: It is admitted subject to the objection.

Mr. Lichty: Q. Now you took the hauls station by station and show from that chart in that proportion the extra haul occasioned by having to haul it from the gravel pit?

A. Yes. You see, a lot of this oil rock that was used for the armor coat, it was an even spread on it from the great bulk we used on the armor coat, and some kept for maintenance but the great bulk of it was armor coat and spread evenly for about three-quarters of a mile I assume there. This chart shows what it cost hauled from the gravel pit and——

The Court: Talk slower. Mr. Person can't get it, you talk so fast.

(Testimony of Homer G. Johnson.)

The Witness: This chart shows what it would have cost if it had been hauled from both pits.

Mr. Lichty: Go ahead.

A. And the chart also shows what it cost by hauling it all from the gravel pit and the difference.

Q. And the excess cost is how much?

A. The excess cost was \$956.48. [200]

Q. At what rate did you figure the overhaul?

A. I think it was twenty-five or ten cents a yard mile. I would have to look here and see.

Q. Well, let's know for sure.

A. Well, I will have to check that.

The Court: Is he your last witness?

Mr. Lichty: No. One more.

The Court: How many witnesses do you have, Mr. Langley?

Mr. Langley: We have none, your Honor.

The Court: We will be able to finish then during the noon hour, won't we?

Mr. Lichty: I think so.

The Court: Well, it seems reasonable?

Mr. Lichty: It seems reasonable. Yes, your Honor.

The Court: Well then, we will go right through and I will hear your arguments later after I come back. I don't want to try to decide the case today.

The Witness: The haul on the maintenance rock, this chart was made up on the basis of eight cents a yard mile.

Q. Eight cents a yard mile? A. Yes.

(Testimony of Homer G. Johnson.)

Q. Is that the reasonable, customary over-haul——

A. Just a minute. I said yard mile. A ton mile.

Q. Ton mile?

A. Eight cents a ton mile. [201]

Q. Is that the reasonable and ordinary cost of overhaul?

A. Yes. That was about the going price.

Q. Now Mr. Johnson, have you the figures that you prepared on the cost of preparing and opening the substitute quarry near Station 1239?

A. Yes.

Mr. Langley: Did he give us the extra cost on this item?

Mr. Lichty: Yes; \$956.48.

Q. I think you testified, did you not, Mr. Johnson, the extra cost was \$956.48?

A. Yes; yes; sure.

Q. Now what was the cost of preparing, shooting and opening the substitute quarry, and what was the detail on those items? What did they consist of?

A. That extra cost was estimated at \$2490.40.

Q. And what was that estimate based on?

Mr. Langley: Just a minute. We are objecting to this estimate. Now we are trying the issue of costs here.

The Court: Why don't you talk out more directly? If you know what the cost was say so. It was your job.

The Witness: Well, I say——

(Testimony of Homer G. Johnson.)

The Court: There is no use using the word "estimate", if you know.

The Witness: It wasn't my own estimate exactly. In other words, it totaled up here to \$2490.40. [202]

Mr. Lichty: Q. What did the principal items of that cost consist of?

A. Well, at that time, at the time that the old quarry was abandoned, there was rock enough shot up in the thing to have finished the job and to have finished the contract at that end, in other words, or from that quarry, and——

Q. Just answer the question, Mr. Johnson. You don't need to argue your case. I will take care of it later. What are the principal items consisting of that cost? Labor? A. Oh, labor.

Q. Powder, or what?

A. Yes; labor and powder and operation cost, like gas, oil, and fuel and all——

Q. Will you give the amount of the various items in your breakdown of that. How much was the labor cost, how much gas, and oil, and so forth.

The Court: So long as the claim is in evidence, just have him verify it generally, Mr. Lichty. Is this the claim he made to the Government? That is all you need. He doesn't need to relate the items for the record. Mr. Langley has asked to have the claim put in. It is in evidence.

Mr. Lichty: All right. I will ask no further questions on that.

Q. Now Mr. Johnson, you made a claim of

(Testimony of Homer G. Johnson.)

\$660.10 for extra cost due to time lost on account of soft rock. Was that item set forth [203] and itemized in your claim to the Government?

A. Yes, that item was in there. That was not included in the other items.

Q. And was that the actual cost of your delay and labor cost due to the time lost in the soft rock in that quarry?

A. Yes. It was fully a months' delay on the job, and the timekeeper—there was an item put in there for overhead expense, which was extra, and due to the superintendent, the timekeeper, and cars' expense, and miscellaneous.

Q. Mr. Johnson, when you did your work in 1937 you had processed and shaped the roadway and the grade preparatory to putting on the armor coat, had you not?

A. Yes. We processed the whole road and then we put oil, the prime coat on a good share of the road.

Q. Now when you returned in 1938 to complete this project due to the inability to complete it in '37, did you have to reprocess, scarify, loosen up the gravel base and reshape the roadbed again?

A. Yes. They required us to. That prime coat didn't hold through the winter, so that the whole thing had to be rubbed up and rescarified and reshaped again.

Q. Have you figured the extra cost of your reprocessing and reshaping in 1938?

(Testimony of Homer G. Johnson.)

A. Yes. It was \$2870.90.

Q. You actually paid out that much? [204]

A. Yes.

Q. That item was set forth in your claim to the Government? A. Yes.

Q. Now in 1937 did you have your oiling equipment on that job? A. Yes.

Q. What did you do with it during the winter of '37 and '38?

A. Well, the oiling men were there then. They moved up to the other work and so we took down an outfit from here.

Q. Then when you went down in 1938 you had to ship down a complete oiling outfit to replace the one that had been there? A. Yes.

Q. And what was the cost of shipping that oiling equipment to the job in 1938?

A. Well, I haven't got it here in this.

Mr. Lichty: I will ask to have this invoice marked as an exhibit—an invoice and a freight bill.

(The three documents so offered were marked Plaintiff's Exhibits 33, 34 and 35, respectively, for identification.)

Mr. Lichty: May I show these to Mr. Langley? Mr. Langley, I am showing you Exhibits 33, 34 and 35. They are freight bills and express bills.

Q. Mr. Johnson, showing you three documents clipped together and marked Plaintiff's Exhibits 33, 34 and 35, I will ask you what those are. What are those, Mr. Johnson? [205]

(Testimony of Homer G. Johnson.)

A. Well, these are freight bills on that oiling equipment.

Q. That had to be taken to the job in 1938?

A. Yes, sir.

Q. And what is the total of them?

A. \$232 and \$255.

Q. Two fifty-five-0-two? A. 0-two.

Q. Making \$487.02? A. Yes.

Q. You paid?

A. Freight on that. That was freight one way, and then back.

Q. You paid those bills? A. Yes.

Q. And it would not have been necessary had you been able to complete the job in 1937?

A. No. If we had got done here before the other left the other oiling outfit would have done it before they left the job.

Mr. Lichty: I offer these in evidence.

(The Uniform Straight Bill of Lading issued by McCloud River Railroad Company to Homer G. Johnson, so offered, was received in evidence and, having been previously marked for identification, was marked received as Plaintiff's Exhibit 33; arrival notice of McCloud River Railroad Company to [206] Homer G. Johnson, so offered, was received in evidence and, having previously marked for identification, was further marked received as Plaintiff's Exhibit 34; and Receipt for Freight Delivered on form issued by Southern Pacific Company to Homer

(Testimony of Homer G. Johnson.)

G. Johnson, so offered, was received in evidence and, having been previously marked for identification, was further marked received as Plaintiff's Exhibit 35.)

Q. Now Mr. Johnson, in the final estimate of the Government a penalty was imposed on you for late completion in the sum of \$1575.00, was it not?

A. Yes.

Q. That was deducted from the money that you received on this contract?

A. Yes.

Q. Mr. Johnson, had the quarry at Station 1239 been a good commercial quarry of sound hard rock, would you, with your plant and equipment and your plan of operation, have been able to complete the entire job before the cold weather and rains of 1937?

A. Yes. We would have completed the job in its entirety.

Mr. Lichty: You may take the witness. [207]

Cross Examination

By Mr. Langley:

Q. Mr. Johnson, I want you to answer this question "Yes" or "No". All these figures that you have prepared you prepared from this payroll that is in evidence; is that correct?

A. You mean all of them, you say? Your question was "All of them"?

Q. Yes.

A. Well, when this here was just prepared here, this sheet I have here, I mean this one that was originally filed with the Bureau of Public Roads,

(Testimony of Homer G. Johnson.)

that was prepared by the cost records and payrolls, yes.

Q. Where are your cost records?

A. We haven't been able to locate our cost distribution which we had on the job and a few times had been taken around and put back in the files, looking forward to the final day of reckoning in this thing, and they have been misplaced somewhere. I have hunted high and low for them but I haven't been able to find the actual cost distribution kept on the job.

Q. Who kept the actual cost distribution on the job?

A. The bookkeeper.

Q. What bookkeeper?

A. Murphy.

Q. Where is Murphy now?

A. He is dead

[208]

Q. Isn't it a fact Murphy was timekeeper and not bookkeeper?

A. Well, it all depends on the job. You generally refer to bookkeeper when you have only one man on the job. He was bookkeeper or timekeeper, whatever you want to call him.

Q. What was Murphy on this job, timekeeper or bookkeeper?

A. He was in charge of doing both types of work down there on the job.

Q. How did you pay him, as timekeeper or bookkeeper?

A. Paid him the same thing, regardless of what it was.

(Testimony of Homer G. Johnson.)

Q. Tell me how you paid him, as timekeeper or bookkeeper.

A. I don't know as we made any particular designation.

Mr. Langley: Well, show the witness the payroll, will you, Mr. Cozad.

Q. Now look at that, Mr. Johnson, and tell us whether you paid Mr. Murphy as a timekeeper or bookkeeper.

A. Well, I don't know if this would exactly signify anything on account of having specified what the man was classed.

Mr. Lichty:: Just look at it and see if you can specify what it says there. That is what he wants to know.

The Court: Do you know what it says?

Mr. Langley: Sure. He had him as the timekeeper.

The Court: All right.

The Witness: It shows timekeeper.

Q. You know as well as anything, Mr. Johnson, that Mr. Murphy didn't know anything about cost records, don't you? [209] A. What is that?

Q. Mr. Murphy didn't know anything about keeping cost segregation records, did he?

A. Well, he is the one that kept them.

Q. What did he keep? Did you ever see them?

A. Ever see what?

Q. The cost distribution records. A. Yes.

Q. Well, tell us what they looked like. What did they have on them?

(Testimony of Homer G. Johnson.)

A. Well, everybody, every man every week was divided into the various work that he had done.

Q. Yes. How was he tied in?

A. And the bills were divided that way, too, every month, by the classing of the various operations on the job, various departments of the job.

Q. This payroll you have got here doesn't show any cost distribution, does it?

A. Well, it is just payroll. In other words, anyone familiar with the organization down there could tell from the payroll here by a little figuring what the men were doing, because the men would be doing what they were shown for on the payroll—what they were hired for.

Q. Were you there all of the time?

A. Practically all the time, yes; a great portion of the time. [210]

Q. All right. Tell us, then, what was the powder man doing in the gravel pit.

A. There was a lot of logs and stumps and one thing and another to take out of there and he had to shoot a lot of stumps out of there, and various things.

Q. On October 30th?

A. Yes, on October 30th probably.

Q. Now as I understand your testimony, Mr. Johnson, you said it cost you \$956.48 extra cost for hauling oil rock; is that correct? A. Yes.

Q. Tell us how you found that off of the payroll.

A. We didn't take that off the payroll.

Q. Where did you get that?

(Testimony of Homer G. Johnson.)

A. Took it from the records. In other words, the locations on the engineer's chart, or the engineer's blueprint on the job, called for 220 yards to the mile and they put it on in that way at 220 yards to the mile, and there were sixteen and some tenths miles there and those quarries and gravel pits were located within certain stations there, within a few feet of certain stations, and you could sit down and figure it out yourself.

Q. You could, huh? You must be a genius. Tell us how you figured it out off of that payroll. That is what I am asking you.

A. We didn't use the payroll. We had the chart to go by.

Q. You had to have some man to do the work, didn't you? A. How is that? [211]

Q. To do this work? A. Yes; Murphy.

Q. Yes.

A. Yes. Murphy made up that chart and made it out there.

Q. In other words, Murphy made up that yellow chart; is that right?

A. Yes, sir. And I checked it before this claim was sent in and have rechecked it since and know it is correct.

Q. That chart doesn't show any men on it, does it?

Mr. Lichty: He is not claiming for men; he is claiming so much yards a mile, whether one man or more.

(Testimony of Homer G. Johnson.)

Mr. Langley: You have to have some men to spread it on.

The Witness: It don't make any difference about that. It was based on eight cents an extra ton mile to haul it, and that was the price for the extra work.

Q. What was the sub-contract price?

A. Well, it was about that.

Q. Sure. You had a sub-contract, didn't you?
"Yes" or "No".

A. Well, the hauling man was working by the yard mile, in other words.

Q. A sub-contractor, wasn't he?

A. Well, I don't know whether you would call it a sub-contract; piece work more or less, I suppose. I think they make a distinction between a sub-contract and piece work.

Q. Let me ask you this, Mr. Johnson: In that estimate you submitted [212] to the Government why did you estimate 220 tons per mile when 320.10 tons were used on the road?

A. Well, there might have been a little discrepancy there but it would be so small an amount that it was immaterial. The plans originally called for the 220 yards per mile and the job was carried out as near that—as near according to the plan as possible. There might have been a few discrepancies one way or the other.

Q. Is that the only discrepancy in your figures?

A. What is that? What was the question? You talk too fast.

Q. Is that the only discrepancy in your figures?

(Testimony of Homer G. Johnson.)

A. Well, that is all that I know of. I don't know as there was a discrepancy there.

Q. What about the—let me ask you this question: Why did you estimate 333 tons in the stockpile at Stations 1534, 1255 and 1086 when only 159.48 tons were there?

Mr. Lichty: I object, your Honor, on the ground there is no evidence in the record as to how many tons were there. When he says only a certain number of tons were there he should have some evidence to substantiate it.

Mr. Langley: It shows on our screening record we had here in evidence.

Q. Now in this claim for superintendence you claim \$660.10, as I understand it. The superintendent and timekeeper you are charging that up to had other duties than the specific duties you are

[213]

claiming for here, didn't they?

A. Well, if we had got done when we should have got done, if this quarry hadn't been a failure we would have been done months earlier and we would have saved that much money for timekeeper and bookkeeper—I mean the timekeeper, superintendent, and cars, and so forth, would have been eliminated or transferred to some other work.

Q. Let me ask you this question, then: Why did you claim \$150.00 a month for the timekeeper when you were paying him only \$30.00 a week?

A. Well, the timekeeper got his board paid besides.

(Testimony of Homer G. Johnson.)

Q. Why did you assume a full month's time of operation of the so-called second quarry when it only lasted two weeks from September 6th to September 18th?

A. Well, we broke four roll shafts there in the other and Wood's directory there shows, or diary, rather, shows sometimes there three days we were broke down from the time we broke down until we got fixed up again.

Q. Mr. Johnson, how many 20-inch by 40-inch Pioneer roll crushers have you?

A. I have got one Pioneer roll crusher.

Q. How many did you have in 1936 and '37?

A. I had one Pioneer roll crusher.

Q. Where was that in the summer, in June, 1937?

A. Well, I don't know exactly now just about the equipment. We [214] have got about two sets of outfits. We have got three sets of rolls.

Q. I am talking about this 20-inch by 40-inch Pioneer roll crusher. You said in your affidavit it was in Portland. Is that where it was?

A. That is my remembrance, that it was here in Portland. Practically all of this equipment was. Now I am not sure about any particular piece.

Q. You want to say that that 20-inch by 40-inch Pioneer roll was not being used on the Morton-Kosmos job near Chehalis in 1937?

A. Well, I am not sure about that. We had a Universal up there; we had a Cone; and I changed some of the machines up there. I have forgot just

(Testimony of Homer G. Johnson.)

what was actually used there and what wasn't. I know there was—you see, we had one outfit in one setup, then we made another setup and then put in a different outfit and brought the other stuff here in to Portland. I don't remember now just what change was made there.

Q. You don't want to answer the question "Yes" or "No", then, I take it?

A. Well, I don't remember definitely about that.

Q. Uh huh. You understand you made a statement under oath, an affidavit, it was in Portland? You understand that, don't you?

A. As I remember, yes. I think that is the way I made the statement. As I remember, it was in Portland.

Q. What do you want to say about it now? [215]

A. Well, I think the same thing.

Q. When did you finish that job up there in Chehalis? What was the date?

A. Oh, it was sometime in the later days of July.

Q. July 17th, 1937? That is correct, isn't it?

A. Oh, I could not tell you because I would have to go back and look at some records.

Q. That 20-inch by 40-inch Pioneer roll crusher was up there on that job, wasn't it?

A. Well, I don't—as I told you, I think that Pioneer roll crusher was here. I think the Universal I was finishing up with was up there.

Q. Do you know J. P. Adams? He is an employee of yours, isn't he? You know J. P. Adams?

A. Yes. I don't know where he is.

(Testimony of Homer G. Johnson.)

Q. He is a crusher man, isn't he?

A. Yes. He worked for me.

Q. He was working on the job for you up there at Chehalis, wasn't he?

A. Yes, he worked up there.

Q. He came from that job immediately down to the job in California, didn't he?

A. Yes, he went down there.

Q. Got on the job down there about July 21st; is that correct?

A. I couldn't tell you when he did get down.

[216]

Q. Well, that would show on the payroll, wouldn't it?

A. Well, I can't tell you offhand.

Q. How about foremen Breed and Meyers—the same situation there? They came from the Chehalis job down to the job in California, didn't they?

A. Well, Meyers did. Breed was here in town and he went down there with Hildeburn.

Q. And the fact is, the reason you didn't get started down there on time is because you didn't finish this job in Chehalis, wasn't it?

A. That didn't have nothing to do with it. In other words, there was two outfits of crushing equipment and two different superintendents and it was a case of getting crews and organizing.

Q. Well, you said this man—what was that?—Meyers was here in town; why didn't you get him down there before the 21st of July?

(Testimony of Homer G. Johnson.)

A. No. I said Breed was down there.

Q. Breed. Yes.

A. Well, possibly he wasn't ready for him.

Q. Sure. Did the increase in the payroll at the Mt. Shasta job of from twelve employees on June 17th to twenty-eight in the week of June 24th result in any way from the completion of the Chehalis job?

A. I didn't get the question?

Q. Did the increase in the payrolls on the Mt. Shasta job from twelve employees in the week of July 17th to the 28th result in [217] any way from the completion of the Chehalis job?

A. Well, I suppose that those, some of those men that we could transfer, why, when they got through over there, they had been out quite a while, why, they moved down there.

Q. On this map you have introduced here to show increased cost on the overhaul, what station is approximately the center of the 16.16 miles?

Mr. Lichty: What station would be the center of the sixteen miles of road, you mean?

The Witness: I would have to sit down here and figure that out.

Mr. Langley: I thought you had the map there.

The Witness: Well, it doesn't show that particular question you have asked. The map shows it there in a chart. In other words, every yard mile shows what it would cost from each one of those setups.

Q. Yes. And your estimate shows costs. Where did your estimate begin to show cost, in the middle

(Testimony of Homer G. Johnson.)

of the 16.16 miles, or did you show it from the beginning of the gravel pit?

A. Well, it shows what the cost would have been for hauling it all from the gravel pit; then it shows what the cost would have been for hauling it from each one of the other places, assuming it was divided there in the center, and the difference between the two was what it cost extra. It wouldn't particularly mean a great deal of difference even if it didn't split right on the exact [218] station where the center came. In other words, the stuff could be spread from the beginning of a mile out, so if it had to be material there as to just how—where you would exactly—where you would really split the thing—whether you split it on the exact station or not would make little difference.

Q. In your claim for moving over to the so-called second quarry, why did you charge 21½ hours for shovel operation September 18, 1937, when the crushing plant was shut down and all the crushing was completed at the original quarry before the full shift was completed. In other words, you only worked eight hours, and yet you charge 21½ hours. Now look at the payroll and explain that.

A. I didn't get that question. You talked so fast I didn't get it.

Q. All right. Find September 18th, 1937, on your payroll.

A. All right. Now what is your question? I have my payroll open here for September 18th.

(Testimony of Homer G. Johnson.)

Q. I want to know why you charged 21½ hours for the shovel operators on that day.

A. Well, those three different operators there on the other job jibes with 21½ hours, so the shovel must have been used 21½ hours.

Q. In other words, your payroll doesn't show it? You say it must. You are just guessing at it, aren't you? (Pause) Oh, well—

(Witness examining papers.)

The Court: Take your time to figure it out. Do you know what he is trying to figure out? [219]

Mr. Lichty: I haven't any idea.

The Witness: He wants to know why the discrepancy on this bill that was put in for this extra amount of shovel time on September 18th, which is shown as 21½ hours, while he says the operators—the bill shows the operators' time put in for that day don't explain that amount, and he says it is not on the payroll, there is not that much time for the operation shown on the payroll, and I am trying to check—

The Court: Well, that is a matter of argument.

Mr. Langley: All right. O.K. We will go on. I will ask you an easy one.

Q. Look on your payroll there on September 12th and tell us why you didn't make any charge for September 12th, if you can.

A. On September 12th?

Q. Yes. A. Was it Sunday?

Q. Well, that is up to you to find out.

The Court: Oh, he doesn't know. Does that say

(Testimony of Homer G. Johnson.)

Sunday, Monday or Tuesday? We don't have a calendar for five years back.

Mr. Langley: All right.

Q. Can you tell from your payrolls how many men continued to work at the original face in the quarry in getting rock to the crusher when you moved over to the second face?

A. Yes; all of these men. In other words, the shovel runners were all taken over there, all worked over there. The powder man and [220] his helper, and the air compressor.

Q. Are you testifying from your recollection, or are you getting those off of that payroll?

A. Well, practically both.

Q. Yes. You can't find it on the payroll, can you?

A. Yes, I can find them. I can pick them out.

Q. Show us how you do it.

A. Well, if you want to take the time for it—

Mr. Lichty: Here is Mr. Wood's diary on that date: "9-12-37. Sunday. Started plant at 3:00 P.M. after 24 hours closedown for Sunday."

Mr. Langley: Q. The point I am getting at, Mr. Johnson, is, you can't show any cost segregation from that payroll, can you?

A. Yes. In other words, if I take a little time for it here I can pick them out because I know who was working and what they are employed for.

Q. But you are doing it from your independent recollection, then, not from the payroll, are you?

A. These costs here (indicating)? Well, they

(Testimony of Homer G. Johnson.)

were taken from the distribution originally, and the distribution was certified, and the payroll corresponds exactly to what the original did, and the distribution sheets, as I testified a little bit ago, we placed some of this stuff in different places to have it ready for a final reckoning day and some of it got lost in six or seven years. That is why I haven't got it. [221]

Q. When did you lose it?

A. I don't know when we lost it. We just misplaced it. We have got all the records out there and we misplaced it some place and can't locate it.

Q. You knew you were going to have a claim against the Government?

A. Yes; certainly I knew it before.

Q. Certainly. You knew you would have to have these cost records in order to establish your claim, didn't you?

A. Sure.

Q. Why, certainly.

A. They were easy to pick out there. In other words, it was on the payroll. It was just moving over in the other quarry because we hadn't enough material in the old quarry to have finished up with. But the original cost distribution, in other words, if you showed all of that and exactly what the thing was, and this thing was based upon that, but just where that is at now, we have hunted high and low here since this thing came up here last—

The Court: You don't need to keep saying that over and over. Ask him another question.

Mr. Langley: Q. Well now, Mr. Johnson, you

(Testimony of Homer G. Johnson.)

say your side of the case is that the quarry was condemned on September 4th. Isn't that correct?

A. Well, we put off a shot there the latter days of August and there wasn't much good, and we picked a little bit out of it and Wood would not take it at all any more. [222]

Q. Now then, answer the question. Wasn't it about September 4th that you claim the quarry was condemned?

A. Well, I hadn't claimed a definite date in there, I don't think. It was approximately in the latter part of August. Wood's diary—

Q. Well then, explain—

A. Wood's diary shows that better than I would remember.

Q. Yes. Your payroll record shows that somebody, I don't know who it was, was working over there in the first place on September 12th, and yet you are coming in here claiming the quarry was condemned on September 4th. Now how do you account for that in your extra costs?

A. How is that question again?

Q. You say the face number one, or the first quarry, was condemned on September 4th. I think that is the correct date. Yet in your claim you are showing operation in the first face on September 12th. Now how do you account for working in the first face if it was condemned on September 4th?

A. Well, the bill shows here cost of moving it to substitute quarry on September 6th. That jibed, as I remember checking that here, with Wood's

(Testimony of Homer G. Johnson.)

directory, or diary. That checks approximately with it.

Q. But you were working over there in the first face on September 12th after it had been condemned; isn't that correct? A. What is that?

Q. You were working over there in the first face on September 12th [223] after you claim the quarry was condemned, it wasn't any good?

A. Oh, the first face, yes. We went back there and picked up a little stuff. Assume that this room was the quarry and there was a little, after it was condemned, entirely practical. There was one corner, say, about like one of these panels here we got a little bit of stuff out of. We ran a few hours after that up there on a shot in another place.

Q. How many tons did you get around there then?

A. Oh, I don't know. We picked around there and got a little stuff.

Q. How many tons would you estimate?

A. It would be hard to recollect that in my mind.

Q. From the screening record, and so forth, you got 3500 tons. A. Out of the old quarry?

Q. Out of the old quarry.

A. Oh, that would be an error, because we only worked in there a small amount.

Mr. Lichty: Mr. Johnson, you put all of your material from the new face, as they call it, through the crusher at that old quarry, didn't you?

A. Yes, sir. In other words, the rock from the new face we found we hauled up to the plant. We

(Testimony of Homer G. Johnson.)

never hauled the plant to the new site. The plant was at the old site all the time. But as far as taking any stuff out of the old quarry after we moved over into the other quarry, it was only just a few hours run a time [224] or two there.

Mr. Langley: Q. Did you make a charge on September 12th for operating in face number two? Look on your payroll there. You have got it there.

A. No, there is no charge made on September 12th.

Q. On September 12th?

A. That is apparently Sunday, September 12th. I guess nobody was working that day.

Q. Well, can't you tell from your payroll whether you were working or weren't working?

A. Well, there was a little work going on there on Sunday but not very much.

Q. What does your payroll say about it?

A. Well, the payroll shows some work going on there; not anywheres near a full crew, just a few men.

Q. Well, now then, you have got a few men working on September 12th. How do you tell by the payroll whether they are working in face number two or face number one?

A. Well, I can't tell from this operation here—I mean from this record here.

Mr. Langley: No. That is all.

Mr. Lichty: That is all. Oh, there is one thing more I want to put in. Well, no; that will be a matter of argument.

Mr. Langley: Just step down, Mr. Johnson.

(Witness excused.) [225]

Mr. Lichty: Now your Honor, on the two items that we have proved here that were not in the original claim in the complaint, the cost of the crusher rolls and the repairs to the crusher, in the amount of \$1029.63, and the cost of shipping oiling equipment in 1938, totaling \$487.02, I am going to ask to amend the complaint to conform to the proof and will within the next twenty-four hours file an amended complaint on those two items.

The Court: It may be filed and the original answer may stand as an answer to the amended complaint.

Mr. Langley: Is that all?

Mr. Lichty: That is all.

Mr. Langley: The only thing that I have, your Honor, is specifications for the State of California and the State of Washington, and the purpose of introducing them in evidence, if your Honor cares to have them, is to show that in the contracting practice a person must go at least 500 feet change of site; that is, this goes to his claim that he is entitled to increased cost for moving from face number one to face number two. These specifications show a minimum distance within which a contractor moves before he is compensated is 500 feet.

The Court: I have already held against you on that issue. That was the issue before.

Mr. Lichty: Yes. That is an issue, not of damages; that is an issue of the right to damages—breach of contract.

The Court: So when I get back you have your findings of fact [226] prepared, Mr. Lichty, to serve on Mr. Langley.

Mr. Lichty: Yes, I will.

The Court: You will no doubt have objections and I will hear you both in argument on everything.

Mr. Lichty: All right. Thank you, your Honor.

Mr. Langley: Well, these findings, if your Honor please, are the findings on the amount of damages?

Mr. Lichty: On the amount of damage. That is the only thing left.

Mr. Langley: Let me ask you one more question. There has not been any pre-trial order prepared of this second part. It doesn't make any difference to me.

Mr. Lichty: The exhibits are in now. It doesn't make any difference whether there is a pre-trial order. It was merely the introduction and identification of the original exhibits.

The Court: The original pre-trial stated that this part of the case would follow later.

Mr. Lichty: Yes.

The Court: Tomorrow morning.

(Thereupon Court was adjourned at 12:33 o'clock P. M.) [227]

Tuesday, August 1, 1944, at 10:45 o'clock A. M., Court convened in Chambers, Mr. John Lichty, Attorney for Plaintiff, and Mr. William Langley, Assistant United States Attorney, in behalf of Defendant being present, the following proceedings were had herein:

The Court: All right.

Mr. Langley: Your Honor, here is the question I had in mind. Mr. Lichty has filed an amended complaint. The body of the amended complaint lays claims totaling about \$15,000.00, and the prayer prays for \$10,000.00. Now under the Tucker Act the jurisdiction of the District Court is limited to claims totaling \$10,000, so I feel as though I will have to object to the filing of this amended complaint on the ground that the Court does not have jurisdiction to consider claims in excess of \$10,000.00.

Mr. Lichty: Didn't the original complaint claim over ten thousand, too?

Mr. Langley: I don't think so. But, anyway, if your Honor accepts the filing of this amended complaint, then I would like to have the Pre-Trial Order changed so that it raises my objections to the jurisdiction of the Court. The Court does not have jurisdiction to entertain the action because the claims amount to more than \$10,000.00 and it becomes more important in the findings of fact because the findings of fact also make you find a total liability in the amount of \$15,000.00, approximately [228] \$15,000.00, but only allow a recovery in the

amount of \$10,000.00. Now of course I know Mr. Lichty is never going to take any advantage of the extra \$5,000.00, but suppose something happens to him and somebody inherits this case, they might go to Congress and get an extra appropriation for the extra \$5,000.00. So we are in the position where we will have to call that to the attention of the Court.

Mr. Lichty: We provide in the findings the plaintiff has waived damages in the excess of \$10,000.00. I think that fully covers that.

Mr. Langley: Of course, I don't see the point. If you are going to limit the recovery to \$10,000.00, why raise any question? Why not have the body of the complaint and the findings claim \$10,000.00? Anyway, all I am doing is objecting. In behalf of the Government I am objecting to the finding in excess of \$10,000.00 and asking that the case be dismissed on the ground the Court hasn't jurisdiction, because the amounts in the complaint—in the amended complaint, are more than \$10,000.00.

Mr. Lichty: I wish to make this statement: That the original complaint on file sets forth claims totaling more than \$10,000.00, where the prayer of the complaint was limited to \$10,000.00—to \$9,999.99; that no objection to the jurisdiction has ever been made until now; that at the time the amendment to the complaint was orally made before the Court there was no objection to the amendment; that there is no attempt made, either in the original [229] complaint or in the amended complaint, to secure a judgment against the Government of more than \$10,000.00 for the breach of this contract; that the

findings clearly set forth that the plaintiff has waived any damages that it might have from the Government in excess of the \$10,000.00, and that within the Tucker Act we are not seeking to recover more than the jurisdictional limit of this Court.

Mr. Langley: Well, the only thing I have to say in reply to that is, at the time the amendment was proposed I agreed to it on the ground it would not be put in the alternative and Mr. Lichty promised it would not be. Now maybe those words of mine were misused. What I meant by the alternative was that the Court would not have to choose, where he could choose \$2,000.00 here and \$2,000.00 there, but he makes it in the alternative where the Court has to choose \$5,000.00 here, \$2,000.00 there, and so on, up to the ten thousand which he could choose if he wanted to but didn't have to choose.

The Court: You can put yourself at ease about what your position may have been previously, so long as it satisfies your own conscience, Mr. Langley. You need have no further concern, because it is my duty, under all the decisions, to examine, upon my own initiative, any jurisdictional questions raised at any time before us. What I am interested in is not what you may have said or thought at the time—.

Mr. Langley: Yes, I appreciate that. [230]

The Court: —but what I am interested in is what the Tucker Act means.

Mr. Lichty: Let's get the Act.

The Court: Does it mean that no claim may be made against the Government for more than \$10,-

000.00, even though judgment for \$10,000.00 only is asked and entered? I wouldn't think it would mean that. Surely it has been construed. I have had a number of Tucker Act cases but I have never had one where this point was involved. They are usually claims for tax refund and the amount is less than \$10,000.00.

Mr. Langley: Well, what I don't understand is, what is the point? What is counsel's point in it? If he only wants \$10,000.00 damages why is he putting in the full fifteen thousand?

Mr. Lichty: You know why, of course.

Mr. Langley: Honestly I don't.

Mr. Lichty: The reason is this: That we are presenting to the Court several items of damages. That record I understand you intend to appeal to the Circuit Court of Appeals. If either this Court or the Circuit Court of Appeals can find that there is any damage proved that will sustain a judgment for \$10,000.00. I think we are entitled to present it to the Court, and as long as we are waiving any damages in excess of \$10,000.00 we are certainly not claiming from the Government in this action more than \$10,000.00.

The Court: It is usually dangerous for a man to try to state [231] another man's position for him, but what I understand Mr. Lichty to maintain is that under the Tucker Act the *constrictor*, so it was in this case, can say, "I was damaged in a number of different ways, \$5,000.00 here, \$2,000.00 there, etc., the aggregate of which is considerably

more than \$10,000.00", and ask the Court to sustain him as to specific items totaling not more than \$10,000.00. Is that the way your findings are drawn?

Mr. Lichty: That is the way the findings are drawn.

The Court: What do they disclose?

Mr. Lichty: Approximately fourteen thousand five hundred—between fourteen and fifteen thousand.

Mr. Langley: Just a few dollars under \$15,000.00, the way I figured it.

Mr. Lichty: That is right.

Mr. Langley: This is Section 41, subdivision 20, Title 18, the popular name of which is the Tucker Act. It says "Concurrent with the Court"—

Mr. Lichty: Isn't it Title 28?

Mr. Langley: Excuse me; it is 28. "Concurrent with the Court of Claims, of all claims not exceeding \$10,000.00 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the parties would be entitled [232] to redress against the United States", and so forth. Now I did the best I could to check this particular problem that we have and I didn't find any cases construing it.

Mr. Lichty: Let me see it, please. (Mr. Lichty examined the statute.) I frankly have never con-

sidered the matter. When the question came up it seemed to me that within the meaning of that, that any time your complaint does not pray for damages against the United States for more than \$10,000.00, when you are willing to waive any damages in excess of that to come within the meaning of the claim not exceeding \$10,000.00, it was proper. If, as counsel says, he has found nothing construing that, and if after search I can find nothing construing it, I would be willing to stand on my feeling of the construction that when you are not asking for over \$10,000.00 you are bringing yourself within the jurisdiction of the District Court.

The Court: I wonder if I understand Mr. Langley's point correctly in its practical aspects. Are you saying that I should find specially only on items totaling not to exceed \$10,000.00?

Mr. Langley: That is my opinion. When the law says if the amount of claims is limited to ten thousand, I should think you only have jurisdiction to make a finding of liability up to ten thousand.

The Court: According to your point of view, Mr. Lichty—

(The Court was here interrupted to answer a telephone call.) [233]

The Court: You show I was interrupted there on the telephone, to explain that break. Under the general doctrine against splitting causes of action I would not think that a man could sue for damages under a contract, under the Tucker Act, claiming

less than \$10,000.00 and ever make any other claim in any other tribunal for further damages growing out of that contract. But I am persuaded to stop, look and listen when you say that a finding of damages totaling more than \$10,000.00 might defeat jurisdiction, even though the judgment was less. Your point is technical, but lots of things are technical about law, and particularly the Federal statutes. Maybe you are not prepared right now to ask me to act finally, Mr. Lichty?

Mr. Lichty: No. Since the point has been raised I would like to look into it to see whether there is merit to it.

The Court: All right.

Mr. Lichty: And bring to your attention anything I can find.

The Court: All right. Then do the rest the way you find satisfactory, over the telephone, if you like. I want to save you further trips up here.

Mr. Lichty: All right.

The Court: You call Mr. Langley on the phone and tell him what your final conclusions are, and then you call me and tell me. I will be here every morning this week, and then later I am not sure.

Mr. Langley: Then you understand my position? I would like [234] to amend the Pre-Trial Order then accordingly, if it goes against me, so as raise the point. I mean, suppose the amended complaint goes back to the beginning of the action, then the Pre-Trial Order is supposed to supersede all proceedings; so even if this amended complaint is filed the Pre-Trial Order has to be amended to corre-

spond to the amended complaint, to make it good in this case. If they are going to amend the Pre-Trial Order I would like to set up my position in the Pre-Trial Order about the jurisdictional question.

Then there is a motion in the case, supported by affidavit, that this case should be postponed pending the return of this resident engineer from the South Pacific, and this motion has never been ruled upon, and I suggest that something be placed in the findings making a finding that the Government is not prejudiced by the failure of this witness to be here, or wording to that effect.

Mr. Lichty: I don't think it is necessary for the Court to find whether they are prejudiced or not. I think that the Court merely would have to find that the case should not be postponed for the absence of the witness.

Mr. Langley: Is this agreeable, Mr. Lichty? I want something in the record to show that our motion has been ruled upon.

The Court: Well, the fact is we went ahead and tried the case. Whether I said so or not, what was in my mind was that I was reserving decision until I heard what the parties had to offer. If [235] I had had the feeling at the end of the case that the Government was prejudiced through the non-appearance of the witness, and that he should be heard before I decided the case, I would have said so, and, if I didn't say so in the record, that was my feeling. I decided the case on the basis that noth-

ing disclosed in the case made me feel that the fact this witness was not available for the Government at this time and that we went ahead without him did not substantially prejudice the Government.

Mr. Langley: Very well.

The Court: That will make your record on that.

Mr. Langley: I would like to have it in the findings.

The Court: No, no. I won't put it in the findings, because that does not accord with the established practice, but what I have just said here gives you all you need to make your record.

Mr. Langley: It is raised as an issue in our pre-trial order.

Mr. Lichty: It does not raise any issue of fact. It does not belong in any finding of fact.

(Thereupon, at 11:10 o'clock A. M., the foregoing hearing was concluded.)

[Endorsed]: Filed March 26, 1945.

[Title of District Court and Cause.]

Reporter's Certificate

I, Alva W. Person, hereby certify that on Tuesday, April 18, Tuesday, June 13 and Tuesday, August 1, 1944, I reported in shorthand all of the evidence given and oral proceedings had in the above entitled cause before the above entitled Court, the Honorable Claude McColloch, Judge presiding; that

I thereafter caused my shorthand notes to be reduced to typewriting, and the foregoing and hereto attached transcript, consisting of 236 pages, numbered 1 to 236, both inclusive, constitutes a full, true and accurate record of all of the evidence given, objections made, rulings thereon and exceptions taken thereto, and all other oral proceedings had upon said dates upon the trial of said cause.

Dated at Portland, Oregon, this 20th day of November, A.D. 1944

ALVA W. PERSON,
Court Reporter.

[Endorsed]: No. 11026. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Homer G. Johnson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 3, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11026

UNITED STATES OF AMERICA,

Appellant,

v.

HOMER G. JOHNSON,

Appellee.

DESIGNATION OF RECORD

Appellant respectfully designates for printing the whole record as particularly itemized in appellant's Designation of Record to the District Court to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, it being the appellant's intention to designate the whole record, namely:

1. Complaint
2. Amended Complaint
3. Answer of Defendant
4. Pre-Trial Order
5. Memo of Decision
6. Findings of Fact and Conclusions of Law
7. Motion
8. Order
9. Judgment
10. Transcript of Pre-Trial Proceedings
11. Transcript of Trial Proceedings
12. Notice of Appeal

13. Designation of Record

14. Points to be Urged by Defendant.

CARL C. DONAUGH

United States Attorney for the District of Oregon

MASON DILLARD

Assistant United States

Attorney.

United States of America

District of Oregon—ss.

Service of the within Designation of Record is accepted in the State and District of Oregon this 30th day of April, 1945, by receiving a copy thereof duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

JOHN LICHTY

Attorney for Appellee

[Endorsed]: Filed May 2, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant respectfully submits the following statement of points upon which appellant intends to rely on appeal:

I.

The district court erred in holding that it retained jurisdiction under the Tucker Act (Act of March 3, 1887, as amended, Judicial Code, Section 24 (20),

Title 28 U.S.C. Section 41 (20) after the complaint was amended during trial to present claims exceeding \$10,000.00.

II.

The district court erred in holding that the claims presented in the amended complaint did not exceed \$10,000.00 within the meaning of the Tucker Act.

III.

The district court erred in holding that a complaint containing interchangeable, alternative claims exceeding \$10,000.00 in the aggregate is brought within the limitations on the jurisdiction of district courts under the Tucker Act by waiver of judgment in excess of \$10,000.00.

IV.

The district court erred in holding that the Tucker Act jurisdictional limitations could be circumvented by permitting amendment of the complaint for the stated purpose of assuring judgment in the amount of the jurisdictional maximum even if some items of claim allowed by the district court were disallowed on appeal.

V.

The district court erred in holding that paragraph 2-2 of the specifications attached to the contract would reasonably induce the belief that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

VI.

The district court erred in construing said paragraph 2-2 as constituting a representation or warranty that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

VII.

The district court erred in not holding that said paragraph 2-2, read in its entirety, expressly as well as by clear implication negatived any representation and prevented reasonable reliance on the first sentence therein as a representation or warranty that an adequate supply of suitable rock was obtainable from the source to the right of Station 1239.

VIII.

The district court erred in not holding that the manifest purpose of said paragraph 2-2, to prevent unsightly scars visible from a national forest highway by giving the engineer control over sources, put plaintiff on notice that other sources than those specified might have to be opened.

IX.

The district court erred in not holding that appellee's inspection of the site, his representation in his bid that he had had independently investigated and thoroughly checked conditions at the site, estopped him from asserting that the government had misrepresented or breached a warranty that there was an adequate supply of suitable material at the source to the right of Station 1239.

X.

The district court erred in imposing liability on the government for costs incurred by reason of plaintiff's having to resort to rock sources other than those he had, unilaterally, without communicating his intentions to the United States or its agents and without making the intentions part and condition of his bid or of the contract, determined to use.

XI.

The district court erred in holding the government liable for plaintiff's faulty inferences and for unforeseen difficulties encountered on the project.

XII.

The district court erred in holding that the extra cost of producing crusher run and rock from the source to the right of Station 870 was chargeable to the government.

XIII.

The district court erred in denying the government's motion for directed verdict on the ground that plaintiff's failure to take an appeal to the head of department in accordance with Article 15 of the contract barred recovery of the extra cost of rock production.

XIV.

The district court erred in giving undue effect to testimony that contractors were accustomed to rely on a designation of source as constituting a representation or warranty that an adequate supply of suitable material was available.

XV.

The district court erred in not holding that plaintiff had waived damages for misrepresentation by proceeding with the work at the quarry right of Station 1239 after representatives of the District Engineers Office had visited the site and determined it was adequate and suitable.

XVI.

The district court erred in finding that but for the fault of the government plaintiff would have completed his contract within the time limited.

XVII.

The district court erred in not finding that the liquidated damages assessed for plaintiff's delay and the extra expense in reprocessing and reshaping the roadway on his resumption of operations in 1938 were due to plaintiff's failure to commence work on the contract promptly and to prosecute it diligently.

XVIII.

The district court erred in finding that plaintiff's failure to complete the project within the time limited in the contract was due to the government's failure to furnish adequate and satisfactory quarries at the source to the right of Station 1239.

XIX.

The district court erred in entering judgment for plaintiff.

CARL C. DONAUGH,
United States Attorney.
By: J. MASON DILLARD,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

Service of the within Statement of Points is accepted in the State and District of Oregon this 26th day of March, 1945, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

JOHN LICHTY
of Attorneys for Appellee.

[Endorsed]: Filed May 12, 1945. Paul P.
O'Brien, Clerk.

11026

No. 1693

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant

v.

HOMER G. JOHNSON
Appellee

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

CARL C. DONAUGH,
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Assistant United States Attorney,
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In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant

v.

HOMER G. JOHNSON
Appellee

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE

This action arose out of a written contract entered into by and between the appellant and the appellee on or about May 27, 1937. By the terms of the contract the appellee was authorized to construct a road for the distance of 16.16 miles on Sections D and E (Port.) of Route 77, Mt. Shasta-Mt. Lassen National Forest Highway, Shasta National Forest, Siskiyou and Shasta Counties, California.

The action arose under the Act of March 3, 1887, c. 359, Sections 1, 2, 24, Stat. 505, as amended; U.S.C.,

Title 28, Sect. 41 (20), commonly known as the Tucker Act. The appellee obtained judgment in the District Court and an appeal is taken to this Court by virtue of U.S.C. Title 28, Sect. 226, Act of February 13, 1925, c. 229, Sec. 4, 43 Stat. 939.

On or about the 28th day of April, 1937, the appellant issued a call or invitation for bids for the construction of the highway. Upon request of prospective bidders, plans and specifications prepared by appellant were furnished, which supplied the bidders with information upon which to base their bids. The following provision was included in the specifications:

“—2.2 Sources of Supply. Gravel for crushing is available approximately 0.5 mile right of Station 870 and rock for crushing is available approximately 0.3 mile right of station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer.”

The appellee obtained a copy of the specifications and also examined the site of the project. (Tr. 114) He further submitted a bid which was accepted by the appellant on or about May 27 1937, and a written contract was entered into between the parties at that time.

The appellee received notice by telegram on June 9, 1937, to proceed with the construction within 10 days thereafter. Sometime around June 16th the ap-

pellee arrived at the scene of the project and started moving in equipment. (Tr. p. 84) After drilling some holes at the place where gravel was to be obtained, the appellee encountered some soft rock. Representatives of the appellant visited the scene and along with the appellee it was decided that, although this rock was not going to be as good as expected, it would be adequate for the purpose. (Tr. p. 87) The appellee then proceeded to work the quarry and set up his crushing plant and produced a portion of the crushed rock. A question again arose as to the quality of the rock but it was finally decided that the rock was adequate. The appellee then stripped and blasted the quarry in order to produce the rock for the contract. During this time the appellee also produced rock from the gravel pit, designated as Station 870 in the specifications. A total of 47,000 tons of rock was used in completing the contract. (Tr. p. 226) The gravel pit was worked 23 days and about 24,890 tons of crushed rock was produced there. (Tr. pp. 182, 226, 221) Some 20,097 tons were produced at the quarry or station 1239, as designated by the specifications. (Tr. pp. 183, 215, 221, 222) After the appellee moved to Upper Bear Creek, about 4,000 tons of cover rock were produced to finish the construction. (Tr. p. 215) The distance the appellee moved from station 1239 to face No. 2 on Upper Bear Creek was 450-700 feet.

Appellee did not complete his construction on October 20, 1937, as required, and on November 5, 1937,

was forced to close down operations due to bad weather. On June 16, 1938, appellant gave appellee notice to proceed and on June 20, 1938, appellee continued his operations, completing the contract on August 21, 1938. The appellee presented a claim to the District Engineer but it was decided adversely to appellee on June 15, 1939. The appellee appealed the claim to the Commissioner of Public Roads at Washington, D. C., on May 13, 1941, but the Commissioner refused to consider the previous ruling of the District Engineer, for the reason that the appellee had failed to appeal from the District Engineer's decision within 30 days as provided by Article 15 of the contract. (Tr. p. 124) The appellee then filed this action on December 7, 1942, over four years after completing the contract.

The appellee in an amended complaint claimed damages in the amount of \$14,994.72 for the breach of contract by the appellant. He only prayed for judgment in the amount of \$10,000. His amended complaint contained 8 different elements or different claims as damages for breach of contract aggregating \$14,994.72. (Tr. pp. 15-17)

The Court returned a verdict of \$9,999.99 in favor of the appellee and allowed the four following elements of damages from the eight claimed in the amended complaint:

1. \$1,575.00—the amount of liquidated damages assessed against the appellee by appellant for

his failure to complete the contract on time.

2. \$956.48—cost of hauling cover material from the gravel pit which would not have been incurred had Station 1239 been adequate.
3. \$4,618.34—extra cost of producing cover material from the gravel pit which would not have been incurred had Station 1239 been adequate.
4. \$2,850.17—cost of reshaping the gutters and roadways in 1938 which had been done once in 1937 and which would not have been necessary had the appellee been able to finish the work in 1937 and his failure to finish in 1937 was due to the breach of contract by appellant, that is, the rock at Station 1239 was not the same quality as represented by the specifications.

The appeal is brought to this Court by the appellant's challenging the correctness of certain findings of the District Court.

ASSIGNMENT OF ERRORS

We believe that the lower court erred in rendering judgment for the appellee for the following reasons:

1. The district court erred in holding that it retained jurisdiction under the Tucker Act (Act of March 3, 1887, as amended, Judicial Code, Section 24 (20), Title 28 U.S.C. Section 41 20)) after the complaint was amended during trial to present claims exceeding \$10,000.00.
2. The district court erred in holding that the claims presented in the amended complaint did

not exceed \$10,000.00 within the meaning of the Tucker Act.

3. The district court erred in holding that a complaint containing interchangeable, alternative claims exceeding \$10,000.00 in the aggregate is brought within the limitations on the jurisdiction of district courts under the Tucker Act by waiver of judgment in excess of \$10,000.00.
4. The district court erred in holding that the Tucker Act jurisdictional limitations should be circumvented by permitting amendment of the complaint for the stated purpose of assuring judgment in the amount of the jurisdictional maximum even if some items of claim allowed by the district court were disallowed on appeal.
5. The district court erred in holding that paragraph 2.2 of the specifications attached to the contract would reasonably induce the belief that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.
6. The district court erred in construing said paragraph 2.2 as constituting a representation or warranty that the rock obtainable from the source to the right of Station 1239 would be adequate in quantity and suitable in quality for the purpose intended.

7. The district court erred in not holding that said paragraph 2.2, read in its entirety, expressly as well as by clear implication negated any representation and prevented reasonable reliance on the first sentence therein as a representation or warranty that an adequate supply of suitable rock was obtainable from the source to the right of Station 1239.
8. The district court erred in not holding that the manifest purpose of said paragraph 2.2, to prevent unsightly scars visible from a national forest highway by giving the engineer control over sources, put plaintiff on notice that other sources than those specified might have to be opened.
9. The district court erred in not holding that appellee's inspection of the site, his representation in his bid that he had had independently investigated and thoroughly checked conditions at the site, estopped him from asserting that the government had misrepresented or breached a warranty that there was an adequate supply of suitable material at the source to the right of Station 1239.
10. The district court erred in imposing liability on the government for costs incurred by reason of plaintiff's having to resort to rock sources other than those he had, unilaterally, without

communicating his intentions to the United States or its agents and without making the intentions part and condition of his bid or of the contract, determined to use.

11. The district court erred in holding the government liable for plaintiff's faulty inferences and for unforeseen difficulties encountered on the project.
12. The district court erred in holding that the extra cost of producing crusher run and rock from the source to the right of Station 870 was chargeable to the government.
13. The district court erred in denying the government's motion for directed verdict on the ground that plaintiff's failure to take an appeal to the head of department in accordance with Article 15 of the contract barred recovery of the extra cost of rock production.
14. The district court erred in giving undue effect to testimony that contractors were accustomed to rely on a designation of source as constituting a representation or warranty that an adequate supply of suitable material was available.
15. The district court erred in not holding that plaintiff had waived damages for misrepresentation by proceeding with the work at the quarry right of Station 1239 after representa-

tives of the District Engineer's Office had visited the site and determined it was adequate and suitable.

16. The district court erred in finding that but for the fault of the government plaintiff would have completed his contract within the time limited.
17. The district court erred in not finding that the liquidated damages assessed for plaintiff's delay and the extra expense in reprocessing and reshaping the roadway on his resumption of operations in 1938 were due to plaintiff's failure to commence work on the contract promptly and to prosecute it diligently.
18. The district court erred in finding that plaintiff's failure to complete the project within the time limited in the contract was due to the government's failure to furnish adequate and satisfactory quarries at the source to the right of Station 1239.
19. The district court erred in entering judgment for plaintiff.

ARGUMENT

I

The first four assignments of error will be con-

sidered together because of their similarity and principles of law applicable.

1. THE DISTRICT COURT ERRED IN HOLDING THAT IT RETAINED JURISDICTION UNDER THE TUCKER ACT (ACT OF MARCH 3, 1887, AS AMENDED, JUDICIAL CODE, SECTION 24 (20), TITLE 28 U.S.C. SECTION 41 (20)) AFTER THE COMPLAINT WAS AMENDED DURING TRIAL TO PRESENT CLAIMS EXCEEDING \$10,000.00.
2. THE DISTRICT COURT ERRED IN HOLDING THAT THE CLAIMS PRESENTED IN THE AMENDED COMPLAINT DID NOT EXCEED \$10,000.00 WITHIN THE MEANING OF THE TUCKER ACT.
3. THE DISTRICT COURT ERRED IN HOLDING THAT A COMPLAINT CONTAINING INTERCHANGEABLE, ALTERNATIVE CLAIMS EXCEEDING \$10,000.00 IN THE AGGREGATE IS BROUGHT WITHIN THE LIMITATIONS ON THE JURISDICTION OF DISTRICT COURTS UNDER THE TUCKER ACT BY WAIVER OF JUDGMENT IN EXCESS OF \$10,000.00.
4. THE DISTRICT COURT ERRED IN HOLDING THAT THE TUCKER ACT JURISDICTIONAL LIMITATIONS COULD BE CIRCUMVENTED BY PERMITTING AMENDMENT OF THE COMPLAINT FOR THE STATED PURPOSE OF ASSURING JUDGMENT IN THE AMOUNT OF THE JURISDICTIONAL MAXIMUM EVEN IF SOME ITEMS OF CLAIM ALLOWED BY THE DISTRICT COURT WERE DISALLOWED ON APPEAL.

The appellee's amended complaint presented eight

different allegations of damages, aggregating \$14,994.72. (Tr. pp. 15-17) The prayer asked for judgment in the amount of \$10,000.00. Title 28, U.S.C., Section 41 (20), commonly known as the Tucker Act, provides that the District Court shall have concurrent jurisdiction with the Court of Claims, of all *claims* not exceeding \$10,000.00. It does not provide for jurisdiction of cases where the *judgment* to be rendered does not exceed \$10,000.00. Since the government may refuse permission to be sued, it may impose such restrictions on the right to sue it as Congress deems necessary. *Schwab v. United States*, C.C.A. Ill., 17 F. (2d) 34. Statutes which have been enacted by Congress yielding the government's immunity to be sued must necessarily be literally and narrowly construed. *Wallace v. United States*, C.C.A. N. Y., 142 F. (2d) 240.

It is a fundamental principle that the United States may be sued only as it gives its statutory consent, *United States v. Shaw*, 309 U. S. 495, 500-501, and since such a statute relaxes the fundamental principle, it is strictly construed so as not to extend jurisdiction in suits against the United States beyond the exact limitations set up by Congress.¹ *United States v. Sherwood*, 312 U. S. 584; *Munro v. United*

¹ In the case of *Rock Island and Central R. R. v. United States*, 254 U. S. 141, at 143, the court said:

"Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with."

States, 302 U. S. 36, 41; *United States v. Michel*, 282 U. S. 656, 659.

The Tucker Act has given the District Court concurrent jurisdiction with the Court of Claims where the claims shall not exceed the sum of \$10,000. It has previously been pointed out that the \$10,000 is jurisdictional. The question to be decided is whether or not a person can present a claim comprised of many interchangeable elements of damages aggregating more than \$10,000, but have the District Court retain jurisdiction by expressly waiving judgment for any amount over \$10,000 without waiving any specific elements or items. In other words, can a party present claims far in excess of \$10,000 for determination by the district and appellate courts, until from its reservoir claims up to \$10,000 have been allowed. It is elementary that the court passes on the claims it disallows as well as the ones it allows.

The waiver of any excess recovery does not remove objections to the consideration by the district courts of large pooled claims aggregating more than \$10,000 when the allowable amount of each is left unascertainable pending judgment in the district and appellate courts. It is true that there are cases which have sustained waivers, (*Hill v. United States*, 40 Fed. 441; *Hedges v. United States*, 42 Fed. (2d) 553; *Hammond-Knowlton v. United States*, 121 Fed. (2d) 192, 202) but these can be easily distinguished from the instant case. In all these cases the claims were re-

duced *pro tanto* before suit. The court only passed on one claim in these cases.

The appellee would have the court pick from his complaint such items of damages as the court might feel he had proved. In this manner the court would be passing on claims in excess of the jurisdictional amount. The court should have required the appellee to elect which elements of damages he would prove or dismiss for want of jurisdiction. In this case of appellee sought to have postponed the selection of the claims to be reduced until a judicial determination had been made. As counsel for the appellee so ably stated to the court his position:

“MR. LICHTY: The reason is this: That we are presenting to the Court several items of damages. That record I understand you intend to appeal to the Circuit Court of Appeals. If either this Court or the Circuit Court of Appeals can find that there is any damage proved that will sustain a judgment for \$10,000.00. I think we are entitled to present it to the Court, and as long as we are waiving any damages in excess of \$10,000.00 we are certainly not claiming from the Government in this action more than \$10,000.00.”
(Tr. p. 305)

No case has been found in which the court has decided the precise question presented here. However, doubtlessly, the realization by other claimants of these jurisdictional considerations explain the absence of decisions on the question. Such claimants have apparently filed their actions in the Court of Claims, whose jurisdiction is not open to question or

reduced their claims *pro tanto* before filing suit.

When a plaintiff sues in a court whose jurisdiction does not extend to the full amount of his claim, his waiver or remittal should be of a *specific portion* of it, so that as to the portion of his claim severed or remitted, he will be deemed to have abandoned it, if it is to be brought within the jurisdiction of the court.

21 C.J.S. 88, *Courts*, s 68 (b).

The case at bar can be easily distinguished from *Oliver v. United States*, 149 Fed. (2d) 727, because in that case the distinct claims sued upon could have been the subject of separate suits without splitting a cause of action. In our case there is only one claim, comprised of different elements of damages. It could not be successfully argued that the plaintiff in our case could have brought separate suits for his different elements of damage. Therefore, it would seem that in order to bring it within the jurisdiction of this court the plaintiff would have had to specifically waive some of his elements of damages. Our suit was on a single claim in excess of \$10,000 and the district courts have many times held that they did not have jurisdiction of such a suit.

It would appear that there is some tendency in the district court of Oregon to extend the Tucker Act jurisdiction beyond accepted limits. There is now pending on appeal in this court the case of *United States of America v. J. H. Gallagher, et al.*, No. 11066,

in which the district court of Oregon retained jurisdiction under the Tucker Act of a case sounding in tort.

It may be argued that the extension of jurisdiction of the District Court to cover cases similar to the one at bar would not be dangerous. It does run afoul of jurisdictional limitations, for if claimants are permitted to present claims containing many elements of damage and in excess of the jurisdictional limitation, the Court becomes a tribunal which must pass on claims of more than \$10,000 in money value. The amount in controversy was \$14,994.72 in the case at bar. The appellee sought to prove all of the damages specified so that even if some items of claim allowed by the District Court were disallowed on appeal, the judgment would still stand. We submit that the statute does not give to the District Court such jurisdiction and that it erred in failing to dismiss the action on motion of the appellant.

II

The next five assignments of error will be consolidated for the purposes of this brief.

5. THE DISTRICT COURT ERRED IN HOLDING THAT PARAGRAPH 2.2 OF THE SPECIFICATIONS ATTACHED TO THE CONTRACT WOULD REASONABLY INDUCE THE BELIEF THAT THE ROCK OBTAINABLE FROM THE SOURCE TO THE RIGHT OF STATION 1239 WOULD BE AD-

EQUATE IN QUANTITY AND SUITABLE IN QUALITY FOR THE PURPOSE INTENDED.

6. THE DISTRICT COURT ERRED IN CONSTRUING SAID PARAGRAPH 2.2 AS CONSTITUTING A REPRESENTATION OR WARRANTY THAT THE ROCK OBTAINABLE FROM THE SOURCE TO THE RIGHT OF STATION 1239 WOULD BE ADEQUATE IN QUANTITY AND SUITABLE IN QUALITY FOR THE PURPOSE INTENDED.
7. THE DISTRICT COURT ERRED IN NOT HOLDING THAT SAID PARAGRAPH 2.2, READ IN ITS ENTIRETY, EXPRESSLY AS WELL AS BY CLEAR IMPLICATION NEGATIVED ANY REPRESENTATION AND PREVENTED REASONABLE RELIANCE ON THE FIRST SENTENCE THEREIN AS A REPRESENTATION OR WARRANTY THAT AN ADEQUATE SUPPLY OF SUITABLE ROCK WAS OBTAINABLE FROM THE SOURCE TO THE RIGHT OF STATION 1239.
8. THE DISTRICT COURT ERRED IN NOT HOLDING THAT THE MANIFEST PURPOSE OF SAID PARAGRAPH 2.2, TO PREVENT UNSIGHTLY SCARS VISIBLE FROM A NATIONAL FOREST HIGHWAY BY GIVING THE ENGINEER CONTROL OVER SOURCES, PUT PLAINTIFF ON NOTICE THAT OTHER SOURCES THAN THOSE SPECIFIED MIGHT HAVE TO BE OPENED.
9. THE DISTRICT COURT ERRED IN NOT HOLDING THAT APPELLEE'S INSPECTION OF THE SITE, HIS REPRESENTATION IN HIS BID THAT HE HAD HAD INDEPENDENTLY INVESTIGATED AND THOROUGHLY CHECKED CONDITIONS

AT THE SITE, ESTOPPED HIM FROM ASSERTING THAT THE GOVERNMENT HAD MISREPRESENTED OR BREACHED A WARRANTY THAT THERE WAS AN ADEQUATE SUPPLY OF SUITABLE MATERIAL AT THE SOURCE TO THE RIGHT OF STATION 1239.

The appellee's contention that paragraph 2.2 was a descriptive representation or warranty upon which he might rely as an assurance that there was an adequate supply of suitable rock at the designated source near Station 1239 was accepted by the court. The government's position is that the provision did not constitute a representation or warranty but merely stated appellee might look to that source for gravel.

A warranty has been defined "as meaning an agreement which refers to the subject matter of the contract, but which is collateral to its main purpose, an engagement or understanding that a certain fact regarding the subject of the contract is, or shall be, as it is declared or promised to be." (Contracts, 17 C.J.S. 795, Sect. 342.)

No particular form of words is necessary to constitute a warranty but it must appear from the language used and the actions of the parties that they intended to enter into a contract of warranty.

Paragraph 2.2 of the specifications provided as follows:

"—2.2 *Sources of Supply.* Gravel for crushing is available approximately 0.5 mile right of Station

870 and rock for crushing is available approximately 0.3 mile right of station 1239. Unless otherwise specifically approved in writing by the engineer only materials from the above sources shall be used for crushing. Additional filler that may be necessary to meet the required grading shall be obtained from sources approved in writing by the engineer."

If the first sentence in Paragraph 2.2 stood alone, possibly in the course of a broad view of how reasonable men would understand a federal contract, a warranty or representation having a proper foundation in law might be worked out by interpolation, to the effect that gravel adequate in quantity and suitable in quality would be obtained from the two designated sources.

Girard Trust Company v. United States, 149 F. (2d) 873.

However, if we look at the entire paragraph and take into consideration other parts of the specifications, only one conclusion can be drawn and that is that the appellant specifically warned the appellee that he might have to acquire gravel from other sources. A provision was inserted that before any other sources were used, the approval of the district engineer must be obtained. This was inserted to prevent unsightly scars visible from a national forest highway. Nothing could have notified the appellee more plainly that it might be necessary to obtain gravel from an additional source.

A further provision was contained in the general specifications (Govt. Ex. No. 22) :

“Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.” (Tr. p. 113)

This provision warned the bidders and the appellee that they would be required to stand all the difficulties incident to the completion of the contract. The specifications pointed out to the bidders where gravel might be obtained, but also informed them that it might be necessary to get it from other places and that bidders were to make their own estimates as to all conditions that might be encountered.

In the case of *MacArthur Bros. Co. v. United States*, 258 U. S. 6, 11-13, an action arising out of a breach of contract for an alleged misrepresentation, the court pointed out in its opinion :

—“But in reality there was no representation by the Government nor is it alleged that the Government had knowledge of the conditions or means of knowledge superior to the knowledge of the Company. The latter acquired knowledge only by the aid of divers as its work progressed. Such being the situation, does not the case present one of misfortune rather than misrepresentation?—There was indication of the manner of performance but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such cir-

cumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking."

The appellee contends that he relied on the Government's representation or warranty that gravel of sufficient quantity and quality could be obtained from the stations designated. However, in his testimony he admitted that he had checked the site very carefully and that it appeared to him that there was sufficient gravel present at the designated spots. He further testified that no one could have possibly known that the gravel would turn out to be soft underneath. He stated that both he and the Government had equal knowledge of the facilities. (Tr. pp. 114, 115)

The appellee would have the court construe the word "available" to mean an insurer of both quantity and quality of gravel. It certainly cannot be said that gravel was not available at both designated places, because 24,890 tons were produced at station 870 (Tr. pp. 182, 221) and 20,097 tons at Upper Bear Creek on Station 1239. (Tr. pp. 183, 217) The mere statement that gravel and rock are available does not imply that an unlimited quantity exists nor a gravel of a specific quality. *Simpson v. United States*, 172 U. S. 372, 380.

The appellee contends that he could reasonably rely on the assumption of an adequate quantity and quality from the designated sources. All evidence points to the contrary and that any reliance that the appellee placed upon the designations was not a reasonable reliance. A faulty inference differs from the descriptive representation. *MacArthur v. United States, supra*.

A misled contractor cannot count on a breach of warranty when the fault is his own. There was no positive, unequivocal, and definite representation as to quantity and quality. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day v. United States*, 245 U. S. 159; *Phoenix Bridge Co. v. United States*, 211 U. S. 188.

Had the contract and specifications provided that *all* gravel necessary for crushing was available at certain designated stations, then the case would be brought within the principle as announced in the following cases:

Christie v. United States, 237 U. S. 234;
Hollerbach v. United States, 233 U. S. 165;
Spearin v. United States, 248 U. S. 133.

However, in our case no definite amount was provided and the specifications specifically called to the attention of the appellee that it might be necessary to seek other sources of supply.

The instant case seems to involve unforeseen difficulties rather than defects in the specifications. We therefore reach the conclusion that:

1. There was no representation or warranty as to the quantity or quality of material at the designated stations.
2. That even if there were such a representation or warranty, the appellee could not have reasonably relied upon it.
3. That even if there were such a representation or warranty and if, further, the appellee reasonably relied upon it, that it was not false, because 24,890 tons were removed from one station and 20,087 tons from the other before any difficulty was encountered and that this satisfied the warranty.

III

13. THE DISTRICT COURT ERRED IN DENYING THE GOVERNMENT'S MOTION FOR DIRECTED VERDICT ON THE GROUND THAT PLAINTIFF'S FAILURE TO TAKE AN APPEAL TO THE HEAD OF DEPARTMENT IN ACCORDANCE WITH ARTICLE 15 OF THE CONTRACT BARRED RECOVERY OF THE EXTRA COST OF ROCK PRODUCTION.

Even if all the foregoing argument is not well taken, there is one further objection that precludes the appellee from recovering in this action. The appellant and appellee entered into a contract which, among other things, contained the following provision:

“Article 15. *Disputes.*—Except as otherwise spe-

cifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The appellee by his counsel admitted that no appeal was made from any ruling at any time. (Tr. p. 124) The interested parties saw fit to provide in the contract an orderly and intelligent means of adjusting disputes. Special appeal provisions were provided for in the contract under which differences could be ironed out and expense of litigation avoided. We believe that the rule forbidding collateral attack on orders which have become final are, of course, essential to the orderly administration of justice. If after ignoring special review and appeal procedures, a litigant can challenge an order or ruling in any court under any circumstances, all special procedures provided by the contract become interesting but futile gestures toward the more intelligent handling of litigation. Unless such provisions are respected and followed every attempt to improve Government contracts by the use of special appeal procedures will be defeated at the outset.

Appellee contended while he was performing his contract and afterwards that he had been caused an

additional expense because of the unforeseen conditions. Appellee waited five months after completing his contract before he made any claim for damages. This was denied and he then waited over two years before taking any further appeal. We believe that his failure to seek the relief provided for in his contract implied a decision, on his part, to accept the conclusion of the head of the department.

A dispute concerning a question of fact certainly arose under the contract. The appellant contended the quarry was available if the appellee used it in the right manner. The appellee contended that the quarry was not as represented and that it caused him great additional expense.

It must be assumed that had the appellee followed the provisions of his contract, he would have secured adequate relief. There certainly is nothing in the record to indicate the appellant or its representatives acted arbitrarily or capriciously. It most certainly would have reduced the expenses for all parties concerned.

In a very recent case the Supreme Court had occasion to pass on the very question we are concerned with now. In the case of *United States v. Blair, et al.*, 321 U. S. 730, 735, 736, the court states:

“Respondent has thus chosen not to follow the only avenue of relief available for the settlement of disputes concerning questions arising under this contract. In Article 15 the parties clearly

set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

* * * * *

“Even if the conduct of the Government superintendent or contracting officer, or their assistants, was so flagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts. * * * Then, absent a valid excuse for not appealing the disputed items to the departmental head pursuant to Article 15, respondent cannot assert a claim for damages in the Court of Claims. * * * here we must insist, not that respondent turn square corners, but that he exhaust the ample remedies agreed upon.”

Rego Building Corp v. United States, 99 C. Cls. 445.

The Court of Claims, in the very recent case of *George F. Driscoll v. United States*, C. Cls. No. 45455, decided October 1, 1945, had occasion to construe this same Article 15, which appeared in the Appellee's

contract. The Court, in denying relief to the contractor, had this to say :

“The contracting officer upon consideration of plaintiff’s claims of May 3 and June 5 and all the facts submitted by plaintiff, and those obtained as a result of his own investigation, decided that plaintiff, and not the Government, was responsible for locating the water main before driving the pile which resulted in its being broken, and that under all the facts and circumstances plaintiff was responsible for the cost of making necessary repairs and for furnishing the Government with fresh water until the repairs had been completed.

“Plaintiff does not claim and has submitted no proof to show that the decision of the contracting officer was so grossly erroneous as to imply bad faith, and it is clear that such a claim could not be made. Plaintiff argues that the contracting officer’s decision was conclusive only as to matters of fact and that the decision which was made consisted merely of conclusions of law. It is contended that the decision was not final as to matters of law relating to the interpretation of the contract. Under article 15 this contention cannot be sustained. The decision of the contracting officer consisted of a decision on matters of fact, as well as matters relating to the proper interpretation of the contract, drawings, and specifications, and his authority to decide the dispute included both questions.

“We think the claim which plaintiff made to the contracting officer, and which it makes here, involves a dispute which arose under the contract which the contracting officer was not only authorized but was required to decide under the provisions of article 15. Except for this, plaintiff would be entitled under the findings to recover \$7,787.12, as set forth in findings 16 and 17.

However, we are of the opinion that the decision of the contracting officer, from which plaintiff took no appeal, was final."

In the case of *Silas Mason v. United States*, decided the same day, C. Cls. No. 44659, the Court remarked, in further construing Article 15:

"We recognize that there may be disputes to which by fair construction of Article 15, it is not intended to apply. For example, in the form in which Article 15 is frequently written, it applies only to disputes concerning 'question of fact.' When so written, it would not, of course, bind the contractor to resort to, nor the government to accord, administrative determination of disputes concerning questions of law. But Article 15 as written in the plaintiffs' contract applied, . . . to 'all . . . disputes concerning questions under this contract.' We think, therefore, that the plaintiffs were required to submit all the disputes upon which this suit is based, to the stipulated administrative procedure."

A very close analogy can be drawn between the question now presented and in the cases where a special assessment is levied against an individual. Where the individual is given an opportunity to be heard and present argument against the planned assesment, and he fails to take advantage of this provision, he cannot later be heard to say that such assessments are unconstitutional.

Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 723, 724;
Farncomb et al. v. City and County of Denver et al., 252 U. S. 7, 11, 12;

Utley et al. v. St. Petersburg, 292 U. S. 106, 109.

The appellee failed to observe the terms of the contract into which he entered. Over four years after completion of the work and more than two years from the last complaint to the head of the department, he brought this suit for damages. We believe that the appellee is barred by his own contract from now asking a court to award him damages. If not barred, his conduct has certainly estopped him from now maintaining this action.

IV

17. THE DISTRICT COURT ERRED IN NOT FINDING THAT THE LIQUIDATED DAMAGES ASSESSED FOR PLAINTIFF'S DELAY AND THE EXTRA EXPENSE IN REPROCESSING AND RESHAPING THE ROADWAY ON HIS RESUMPTION OF OPERATIONS IN 1938 WERE DUE TO PLAINTIFF'S FAILURE TO COMMENCE WORK ON THE CONTRACT PROMPTLY AND TO PROSECUTE IT DILIGENTLY.

The District Court allowed appellee \$2,850.17 damages for reprocessing and reshaping the roadways and gutters in 1938. (Tr. pp. 40, 41) This work had previously been done by appellee in 1937 but due to winter weather conditions, it was necessary to do it again in 1938 before completing the work.

We feel that the Court erred in allowing the appellee any damages on this account because the con-

tract did not require that the appellee do this work until the project was completed. Of course, the appellee is not entitled to damages for work performed by him, but not required under the contract. The appellee's work was not accepted until August 2, 1938. Any work done by the appellee before this time had not been accepted. It is the appellant's position that the appellee never should have done the work unless he could have finished the project in 1937. There was an equal showing on the Government's part that the appellee's failure to proceed diligently prevented completion of the work in 1937 and was as great a reason for his losses as the lack of quality gravel.

V

10. THE DISTRICT COURT ERRED IN IMPOSING LIABILITY ON THE GOVERNMENT FOR COSTS INCURRED BY REASON OF PLAINTIFF'S HAVING TO RESORT TO ROCK SOURCES OTHER THAN THOSE HE HAD, UNILATERALLY WITHOUT COMMUNICATING HIS INTENTIONS TO THE UNITED STATES OR ITS AGENTS AND WITHOUT MAKING THE INTENTIONS PART AND CONDITION OF HIS BID OR OF THE CONTRACT, DETERMINED TO USE.
11. THE DISTRICT COURT ERRED IN HOLDING THE GOVERNMENT LIABLE FOR PLAINTIFF'S FAULTY INFERENCES AND FOR UNFORESEEN DIFFICULTIES ENCOUNTERED ON THE PROJECT.
12. THE DISTRICT COURT ERRED IN HOLD-

ING THAT THE EXTRA COST OF PRODUCING CRUSHER RUN AND ROCK FROM THE SOURCE TO THE RIGHT OF STATION 870 WAS CHARGEABLE TO THE GOVERNMENT.

14. THE DISTRICT COURT ERRED IN GIVING UNDUE EFFECT TO TESTIMONY THAT CONTRACTORS WERE ACCUSTOMED TO RELY ON A DESIGNATION OF SOURCE AS CONSTITUTING A REPRESENTATION OR WARRANTY THAT AN ADEQUATE SUPPLY OF SUITABLE MATERIAL WAS AVAILABLE.
15. THE DISTRICT COURT ERRED IN NOT HOLDING THAT PLAINTIFF HAD WAIVED DAMAGES FOR MISREPRESENTATION BY PROCEEDING WITH THE WORK AT THE QUARRY RIGHT OF STATION 1239 AFTER REPRESENTATIVES OF THE DISTRICT ENGINEERS'S OFFICE HAD VISITED THE SITE AND DETERMINED IT WAS ADEQUATE AND SUITABLE.
16. THE DISTRICT COURT ERRED IN FINDING THAT BUT FOR THE FAULT OF THE GOVERNMENT PLAINTIFF WOULD HAVE COMPLETED HIS CONTRACT WITHIN THE TIME LIMITED.
18. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF'S FAILURE TO COMPLETE THE PROJECT WITHIN THE TIME LIMITED IN THE CONTRACT WAS DUE TO THE GOVERNMENT'S FAILURE TO FURNISH ADEQUATE AND SATISFACTORY QUARRIES AT THE SOURCE TO THE RIGHT OF STATION 1239.

The remaining points will be considered together because they all depend upon one question: whether

the appellee is entitled to damages because of the failure of Station 1239 to provide adequate and suitable gravel.

The contract designated two sources of gravel and rock supply. The positions were designated by the Government because the road was in a national forest highway and it was important to preserve the landscape along the roadway. (Tr. pp. 175, 176) There was no investigation by the Government as to the quantities available. The contract provided that the appellee was to examine the premises and make his own estimates as to conditions present. He testified that he had done this. (Tr. p. 114) The contract expressly provided that other sources might be necessary. There was nothing in the contract that required the appellee to use both designated sources of gravel. There was nothing that informed the appellee that an unlimited supply of gravel could be obtained at either designated source. The insertion of the designated sources was for the appellee's convenience. The Government didn't care where the appellee obtained the gravel so long as it didn't mar the landscape along the highway.

It was the appellee's contention (Tr. pp. 18-19) that "the government would not have provided that he would have to use this rock if they hadn't satisfied themselves thoroughly it was satisfactory," and "... if they had not put that in—you might say to produce our own experience if they hadn't done that, but this

lowered our guard and we were entitled to rely on it," and "we assume they stand back of it," and "they say, 'Well, there is a quarry site here, or a gravel pit here,' and so forth and when they do, why, generally those are picked out to be the best and more suitable material generally on the job that is available for the job, so the contractors have got to where they rely on those things, and when they get specifications for a job they immediately look up the sources of the material and if the sources are stated then they go right to those sources and if they look all right, in other words, if they look as though the material is there, there is nobody can see in the ground, one man can't see in the ground any more than another can, and so we look the situation over and if every indication looks favorable that the material is there, or all right and everything, why, we know they have specified it, and we assume they stand back of it, which has been practically the custom, I take it."

This was the plaintiff's testimony and his contentions which support his allegations of damages. It would appear from his own testimony that the Government never made any warranty and that if later on conditions were different from those expected, it was because of the appellee's faulty inferences. The Government had never done any core drilling and couldn't tell. (Tr. p. 24) The appellee figured it was all right from past use and from the surface appearances. Plaintiff's own witness, Hildeburn, (Tr. p. 59)

testified that from the outside "it was a very fine looking quarry . . a beautiful quarry, . . it looked like very nice crushing material." "It had all the earmarks of being a beautiful quarry." (Tr. p. 67)

The appellee's testimony further points to a reckless bid:

"That had sort of become a custom here for years amongst all the engineers of the country and all the different departments letting public works, that if they were going to furnish the sites, in other words, why, they generally had lots of time to select out these sites, while we never had time to go out there and core drill these quarries, and couldn't neither."

However, the record shows that the plaintiff in his bid stated that he had checked the site of the proposed work very carefully. (Tr. pp. 36-37) Bidders were expected to examine the work and decide its character for themselves. *Central Dredging Company, Inc. v. United States*, 94 C.Cls. 1, at page 12. The facts were not peculiarly within the knowledge of the Government's agents. It would seem that what was involved was an unforeseen difficulty and not a defect in the plans or specifications. If there is no misrepresentation or concealment by the Government, there is nothing on which the contractor can claim to have relied. *Cassidy and Gallagher v. United States*, 95 C.Cls. 504. A claim for extra costs due to misrepresentation is not supported by slight differences between materials actually encountered in excavation and those indicated in the specifications. *General*

Contracting Company v. United States, 96 C.Cls. 255.

There is an abundance of testimony that had the appellee set up his equipment promptly and prosecuted his work diligently he would have been able to complete his contract in time in 1937 and that even with the difficulties encountered, had the appellee realized that time was of the essence of the contract he could have completed his contract on the date specified. (Tr. pp. 125, 129, 130)

A total of 4,262 tons of rock out of a total 49,249 tons was taken from a source different from that provided by the contract. (Tr. p. 183) Had the appellee been forced to take all but a thousand tons of rock from the gravel pit the terms of the contract would have been satisfied. However, here practically all of the rock was taken from the designated sources.

Appellee contends, though, that he is entitled to damages of \$956.48 for the cost of extra hauling from the gravel pit which would not have been necessary had Station 1239 been adequate. Also \$4,618.34 extra cost of producing cover material from the gravel pit which would not have been incurred had Station 1239 been adequate. As we have previously pointed out, there was nothing in the contract that implied there were unlimited quantities of materials at either designated place. The appellee was there and was told to make his own estimates. He cannot be allowed damages now for a result which was due at least in part

to his own failure to properly estimate the difficulties involved.

Appellee also obtained judgment for \$1,575, the amount of the liquidated damages assessed against him for his failure to complete the contract on time. The appellee never began work until June 29th and no crushed rock was produced until August 9th. The appellee never at any time recognized that time was of the essence and made no determined effort to complete the contract as provided. He had contracted to do the work in a certain length of time. He was responsible for conditions that arose that neither party knew about previous to the contract. It was incumbent upon the appellee to provide enough men and equipment to complete the work on schedule regardless of the conditions encountered. This he failed to do. He cannot complain now that the Government assessed liquidated damages against him when he contracted with these things in mind. Appellee contends that the failure to complete the contract as provided was due to the Government's failure to provide adequate materials. The appellee was in charge of operations and the Government exerted no control over his operations. It is true that the rock produced had to meet certain specifications. However, the evidence shows that the failure of some rock at the quarry to meet specifications was due at least in part to the method of operation by the appellee. (Tr. p. 191) The appellee was advised as work went slowly

that his time was running out and that it was important to proceed with all haste. (Tr. p. 202)

While it is true the Government informed the appellee that gravel was available at two designated spots, they did not say that unlimited supplies were present. The appellee encountered unforeseen conditions and now contends the Government should be obligated to pay him for his extra costs incurred. If his position is sound, the Government may as well never enter into a contract but merely pay for its work by the day. The Government cannot be made liable for conditions about which it knew nothing and for which the appellee contracted.

VI

19. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFF.

If any of the previous arguments are sound, the Court erred in entering judgment for appellee.

CONCLUSION

We respectfully submit the judgment of the District Court should be reversed and an order entered dismissing the action.

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J. ROBERT PATTERSON,
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In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

HOMER G. JOHNSON,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United
States for the District of Oregon.

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In the United States
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UNITED STATES OF AMERICA,
Appellant,

v.

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BRIEF OF APPELLEE

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE

Appellant's statement of the case is chronologically correct and adequate through the statement beginning on Page 2 and ending on Page 3 as follows: "Sometime around June 16th the appellee arrived at the scene of the project and started moving in equipment".

Immediately after arriving on the project Johnson and his superintendent, Hildeburn, together with a Mr. Thomas, who was going to do the trucking, drove to the job together and made their plans for the method of proceeding to complete the contract. They had to first construct a camp to house approximately 50 men and look after getting the lumber for this camp and getting the necessary equipment. (Tr. 85)

Defendant introduced in evidence the original diary kept by Joseph E. Wood, the resident engineer of the defendant on the job, which diary kept a record of the daily events occurring on the project, and this diary will be referred to frequently. From the diary it appears that on June 28th the superintendent, Hildeburn, arrived with a compressor and on June 29th work was started on the quarry. It was decided that the logical method to develop the quarry was to, what is termed by contractors, "Coyote" the quarry. This process consists of digging a tunnel similar to a coyote hole in the base of the quarry and then running cross-cuts loading them with explosives and shooting the quarry. Shortly after the 4th of July plaintiff talked to Hildeburn long distance, who advised him that soft rock was being encountered in the process of tunneling, that in his opinion the quarry was going to be a failure as he had encountered soft rock. (Tr. 86-87) A few days after that Hildeburn called Johnson and stated that Mr.

Wood, the resident engineer had sent for the material engineer of the Bureau of Public Roads in San Francisco and he told Johnson to come down. When Johnson got down, Mr. Steele, the materials engineer, was present and they all discussed the question of the soft rock which had been found in the quarry. Johnson was then told by the engineers that although the material was not what they thought it was or what they would like to have it they would have to make the best of it as they had searched the vicinity for rock quarries and nothing else was available. (Tr. 87) Mr. Wood's diary (defendant's Exhibit No. 20) in connection with this shows:

July 11th. Mailed note to Potter, rock in quarry turned soft. Looked at other possible quarry sites, one at Bear Creek near Potosi and at Dixon Flatts.

July 12th. Sent samples of binder and rock to Bureau of Standards.

July 13th. Contractor laid off all other work to do work on coyote hole.

July 14th. Rock looks fairly good though not the best.

July 17th. Don Steele approved quarry if material was mixed.

On July 23rd the contractor shot the quarry and set up his crushing plant and proceeded to attempt to produce the material for the construction of the highway.

The quarry was a typical dragline operation and as the dragline bucket worked down into the material

at the top of the quarry soft rock was encountered and as they went to the right there was soft rock right up to the top of the quarry and they had to abandon the right hand side entirely. (Tr. 90-91) The material was so soft that it mashed as it went through the rolls of the roll crusher and would adhere to the rolls and build up and throw the shafts out of line and several shafts broke during the operation. Each time a roll shaft broke the operation would have to shut down for 3 or 4 days while new rolls were obtained from Portland, San Francisco or Spokane.

The contractor testified (Tr. 92) that he had used this same roll crusher on another job before and that he had rented it out on another job and no shafts had ever broken before, that he had used the equipment on subsequent jobs and had only sold it a short time before the trial, and that at no other time had a roll shaft ever broken.

C. Jackson Eldon, a contractor of long experience in this territory, testified (Tr. 162) that he had never had a crusher roll shaft break. That in order to cake on the rolls dense enough and tough enough to break a shaft that the material would have to be more or less the consistency of hard rubber. That certain clays might do that.

Johnson testified that as they continued to operate the quarry that the inspectors would check the loads of material and that due to the soft material the

loads would be lighter than if the material were solid. They would hold the trucks up or order the material dumped or stop things until they got hold of the Resident Engineer, and there was a lot of delay holding up the trucks. (Tr. 93) That many days they were shut down in the attempt to do something to improve the condition.

Johnson testified that the material in this quarry was so soft that he could take a piece of it, similar to a stick of stove wood, and take his jack knife and practically whittle it.

The job undertaken by the plaintiff consisted in resurfacing a highway some 16 miles in length. The gravel quarry described in the call for bids and specifications was located 0.5 miles right of Station 870 and the rock quarry, which is the one we have been discussing, was located approximately 0.3 miles right of Station 1239. These locations were particularly attractive as one was about four miles from one end of the job and the other about four miles from the other end. Had these quarries both contained material satisfactory for the job there would not have been a haul of more than four miles with any load of material and the average haul would have been just two miles, that, therefore, was an important factor in considering the amount of the contractor's bid that these quarries were specified as available.

Mr. Wood's diary shows the continual difficulty in producing good material:

August 10th. Have had contractor close up rolls but still having trouble getting grading.

August 11th. Grading is closer but still a little under.

August 12th. Broke shaft of rolls.

August 21st. Poor rock, closed plant down at 10:00 p. m.

August 23rd. Contractor moved bucket line north to harder rock in the quarry.

August 27th. Closed plant down about 9:00 a. m. and wasted about 70 tons of rock.

August 28th. Closed plant down 9:30 p. m. due to poor rock.

August 29th. Contractor hauled rock on Pondosa road.

August 31st. Closed plant down at 7:30 p. m. Too much soft for proportion of hard rock. Steele and McCoy were here.

September 1st. Contractor did not place rock on road because not enough hard rock available in quarry.

September 6th. Contractor started up Bay City shovel, prospected around for available rock. Broke shaft in rolls at 9:00 p. m.

September 9th. Plant broke down about noon. Broke shaft in rolls last night. Contractor hauled in rock from new quarry Bear Creek. Sent sample of rock to District Office.

September 11th. Started plant after fixing rolls at 7:00 a. m. Rock from new quarry.

September 13th. Moved into quarry No. 2 at about 9:00 a. m. Rock looks pretty good from new quarry thus far.

Mr. Johnson testified that right after Labor Day he went to San Francisco to see the engineers at the District Office and talked to Mr. Potter at the District Office and discussed with him what could be done to remedy the situation that existed at the quarry. That Potter told him he thought he should abandon the rock quarry and move to the gravel plant, and Johnson told him it would cost a lot more money to haul the material from the gravel plant and that something would have to be done to solve the situation; that Potter then told him that he would be up to the job within a few days. (Tr. 105) That while Johnson was in San Francisco, Mr. Hildeburn had taken the gas shovel and had done some prospecting for another source of material and went up the creek a ways and located some rock which looked a little better and they opened up a quarry at that spot. The material had to be trucked from the second quarry to the crushing plant at the old quarry site. That this made the operation much more costly. (Tr. 107-108) That it was only a short time before the rock in the second quarry also began to turn soft and build up on the rolls and they then abandoned both quarries and moved into the gravel pit near the other end of the job. That at that time they had completed about six or seven of the sixteen miles of the base course material and they had produced no oil rock, and that too was their greatest difficulty. That as the surfacing material was placed on the road they put a prime coat of oil on the surface and they had not been able

to produce any oil rock and they could not put the seal coat on without the oil rock to go on top of the seal coat. (Tr. 109)

Johnson testified that they had completed crushing and placing the base course over the entire project from the gravel pit that fall and finished crushing enough oil rock to completely finish the project but that bad weather interrupted placing the oil rock. (Tr. 110) Johnson then testified that about the 18th or 20th of June of the following year he received notice from the Bureau of Roads to proceed. That for almost a month prior to that time they put a grader in maintaining the road. It was being used for traffic all of this time, that the gutters and ditches, which had been finished and cleaned the fall before, were full of material that had sloughed off during the winter, which they had to clean out a second time without any extra pay. That they had to scarify and rip up the surfacing from one end of the job to the other, work it hard and put the prime coat on again before applying the oil rock to the seal coat, for all of which they received no extra compensation, and the Government failed to extend his time of completion and penalized him for late completion. That had the quarries, specified by the Government to be available, been adequate for the production of proper material for this job he would have been able to have completed this job within the time limited by his contract. (Tr. 111-112)

Harry Hildeburn, the plaintiff's superintendent,

explained to the Court the difficulty in producing oil rock pursuant to the trial Judge's questioning. The following is a quotation of his testimony: (Tr. 150)

"The Court: Why couldn't you get oil rock out of this quarry?

A. Because this rotten rock would come in and contaminate the good rock, and of course if any of that got into the oil rock it would ruin it.

The Court: Why? How would it ruin it?

A. Well, in other words, we will call this rotten rock a piece of clay, and if you put a piece of clay in your oil rock and it is spread on top of the oil and then your roller comes along and rolls that into the oil, why, your roller would immediately (73) mash this rotten rock; then you would have a space there of an inch or two inches that would be nothing but a clay spot and would immediately fade out under the traffic.

The Court: It has to be uniform and hard?

A. It has to be uniform and good rock. It is the best rock we can produce to qualify as oil rock.

Mr. Langley: But you didn't try to produce any? There was no test ever run on any? Is that correct?

A. Oh, no. No, no. From experience we knew we could not produce it.

Q. You were relying upon your own judgment, then, to some extent, weren't you?

A. No. I testified a while ago I was told we would not be allowed to use that for oil rock.

Mr. Langley: That is all, your Honor."

Mr. C. Jackson Eldon, who is considered as an expert in road construction, after having read the specifications relative to the sources of supply, was asked this question: (Tr. 159)

Q. Mr. Eldon, suppose that it turned out that the quarry located approximately three-tenths of a mile right of State 1239 consisted of an overlaying of a narrow facing of hard rock, we will say, ten to twenty feet, and as you go into the quarry you encounter soft material which will ball up on a roll crusher, would you say, Mr. Eldon, that such a quarry would be a quarry which complied with the specifications that the specifying officer agreed to provide?

A. Let me ask a question. Was it a known fact at the time that that was the nature of the quarry?

Q. We are disregarding that, Mr. Eldon. I am merely asking you, if it developed that the quarry was such as I have described, had soft rock with an overlaying of hard rock, would you say that the specification that rock is available for crushing (83) at that station, would that kind of a quarry in your opinion comply with that specification?

A. I would not consider that to be in accord with the representation made in that preceding paragraph.

Q. Is such a quarry as I have described, Mr. Eldon, in your opinion, a quarry fit for the purposes that I have indicated, for the construction of a road project, and particularly one that requires oil rock surfacing?

A. I would not think so.

Q. In good contracting practice would that be a good rock crushing quarry?

A. I wouldn't think so.

Q. Mr. Eldon, will you explain to the Court if you know why it wouldn't be—first, I will ask you, would it be possible or reasonably possible to produce oil rock from such a quarry?

A. It might be possible but it would be impracticable—impractical. It is possible that some of the rock may have been picked out to produce some oil rock but it is wholly impractical from a contractor's standpoint.

Q. It would be highly expensive then?

A. Well, it would be so expensive it would be prohibitive.

Q. Now will you explain to the Court why that is your opinion."

Mr. Johnson testified that had the quarry which they first opened been an ordinary commercial quarry containing rock satisfactory for the production of the material required by this job, that he could have crushed between 850 and 1100 tons of material a day; that at that rate from the time the crushing operation started he could have completed the entire job in 45 days, allowing only 2 or 3 days additional for moving the plant from the first quarry to the second quarry. This would have permitted him to have completed the entire job by approximately the middle of September. (Tr. 226-227)

The Trial Judge tried the case in two parts; first hearing the testimony relative to the claimed breach of contract, and after having determined that the plaintiff was entitled to damages heard plaintiff's witnesses relative to the damages incurred. Defendant offered no witnesses to rebut any of the items of damages claimed. During the progress of the testimony relative to damages a great number of items of the damages were proved which were not alleged in plaintiff's complaint. Defendant made no objection to this proof and at the close of the evidence, plaintiff's attorney moved for leave to amend the complaint to conform to the proof, however, waiving any judg-

ment in excess of \$10,000.00 and limiting the prayer of the amended complaint to the sum of \$10,000.00. The court granted leave to so amend and made findings of fact and conclusions of law allowing plaintiff a judgment in the sum of \$9,999.99, all within the jurisdiction of the court under the Tucker Act.

Appellee's attorney will, in this brief, attempt to follow and answer the arguments of Appellant's argument upon his Assignments of Error by considering them in the order which Appellant has done in its brief.

ARGUMENT

I

Appellant argues in support of his first four Assignments of Error that although the complaint in this cause gave jurisdiction to the Court under the Tucker Act in that the damages claimed did not exceed \$10,000.00, that by amending to prove items of damage exceeding \$10,000.00 although waiving any claim for damages in excess of \$10,000.00, that the court somehow lost jurisdiction of the cause. This proposition is specifically decided against appellant in the three cases cited on Page 12 of its brief, to-wit:

Hill v. United States, 40 Fed. 441.

Hedges v. United States, 42 Fed. (2d) 553.

Hammond-Knowlton v. United States, 121 Fed. (2d) 192.

In the last of these cases the court says:

“It is also held that, if a plaintiff has a claim against the United States for more than \$10,000.00, he may, if he waives the balance when he begins the suit, maintain an action against the United States for that limited amount in the District Court under the Tucker Act. (Citing cases) It would seem to follow from the foregoing that, if in a suit under the Tucker Act, the judgment were for \$10,000.00 or less, but the pleadings showed a demand for, say, \$12,000.00, the judgment nevertheless would not be such to collateral attack.”

This court in the case of *Oliver v. United States*, 149 Fed. (2d) 727, made an excellent analysis of the purpose of the Tucker Act and of the intention of Congress in enacting that statute, as this Court well said in that decision: “It is clear that it was the amount of the claim not of the suit for an aggregate of claims which Mr. Tucker’s committee thought should be protected by the head of the Department in the suit in the Court of Claims in Washington”.

It is very difficult for the counsel for the Appellee to see wherein it would be more onerous to require the Department to defend the suit on a claim where the claimant may have been injured in excess of \$10,000.00 but is willing to limit the amount of his claim in the suit to \$10,000.00 than if the claimant had only been injured in the sum of \$10,000.00 and still sought to recover that amount of money. The purpose of the Tucker Act was to relieve claimants who resided in localities remote from the Court of Claims from the

expense and bother of filing suit in the Court of Claims and prosecuting it in that jurisdiction far removed from their place of residence, and if a claimant who has actually been injured by the act of the Government to the extent of \$15,000.00 wishes to waive any injury in excess of \$10,000.00 to require him to go into the Court of Claims would be to defeat the very purpose impelling Congress to enact this legislation for his relief. It is Appellee's firm contention that it is only in the event that the claimant is seeking to recover from the Government on any one cause of action or suit, a sum in excess of \$10,000.00 that the District Court of the United States is deprived of jurisdiction, and certainly it was thoroughly understood at all times during the trial of this case that Appellee was limiting any claimed amount for which the court might give judgment to the sum of \$10,000.00 and waiving any portion of his claim in excess of that amount.

II

Appellant's argument on Assignments of Error Five to Nine, inclusive, is all directed to the proposition that the Government and its engineers did not, by Paragraph 2.2 of the specifications, warrant that the material in the quarry located approximately 0.3 mile right of Station 1239 was material which would, when produced, comply with the specifications for the material which the contractor was required to pro-

duce for this job, and that the successful bidder could, by ordinary contracting practices, produce the material so required of him from that quarry. It is very difficult to see the purpose of placing this provision in the specifications which were furnished with the call for bids, unless it was the intention of the Government to advise the contractor that such was the case and that he could, in figuring his bid and estimating his costs, rely upon this fact without further investigation. The Government and its engineers further provide, "unless otherwise specifically approved in writing by the engineer, only material from the above source shall be used for crushing." Would any contractor, figuring this job, for a moment contemplate that he would have to look elsewhere for his material? He is specifically advised that if he does figure the job and use any other source of material in his figures that he is running a hazard of having that material subsequently disapproved by the engineer. These two sources of material made an ideal set-up for the performance of this job. One quarry was located at approximately the center of the east half of the job and the other located at approximate the center of the west half. This cut the average haul of material of spreading on the road to approximately two miles, the longest haul that would have been necessary being four miles.

We agree with appellant's definition of a warranty, in that it is "an engagement or understanding

that a certain fact regarding the subject of the contract is, or shall be, as it is declared or promised to be". (Appellant's brief P. 17) Applying that test to Paragraph 2.2 of the specifications, it is hard to see that it can be construed as anything but a warranty. We disagree with Appellant's construction of the second sentence of that section of the specifications. Appellant states that it was intended by that second paragraph to warn the appellee that he might have to acquire gravel from other sources. This is certainly inverting its actual meaning and the one that would naturally be derived from it. It is a specific warning to bidders that it would be folly for them to search for sources of material for themselves, as they would run the risk of having the material rejected by the appellant's engineers and it most strongly supports Appellee's theory relative to the warranty as it contains a strong inference that the Government engineers have inspected, examined and already approved the material to be obtained from the source designated. It is true there was a general provision in the general specifications providing "bidders must make their own estimates of facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies". This is a general provision in the general specifications of all Government contracts, but by all fair and accepted rules of construction when the Government prepares a specific specification for this particular contract, in which sources

of supply are designated, then to say that by a general provision of this character the Government can relieve itself of liability for a misstatement of fact would reduce the whole situation to an absurdity. Ordinary rules of the construction of this provision in the general specifications would be that by particularly including local conditions and uncertainty of weather, other contingencies are excluded and by the rule of "*ejusdem generis*" other contingencies should be held to relate to those of similar nature to those specifically mentioned.

We are not relying upon fraud or misrepresentation in this case and according to Appellee's theory it is immaterial whether or not the Government engineers took the trouble to core drill the quarry in question or make other investigation for its own account as to the character of the material in the quarry, nor is it necessary for us to prove whether the Government material engineers knew or did not know the character of that quarry. We are relying upon the declaration of the source of the material as a warranty that the material in quality and quantity necessary for the efficient performance of this job could be obtained from either or both of these quarries.

It is a general rule of construction that where one party has prepared a contract any ambiguities present in the contract should be resolved in favor of the other contracting party, and in this connection, it

must be remembered that the call for bids and the specifications must all be construed together in determining the meaning of the contract.

Schwartz v. United States, 89 Court of Claims 82.

The argument that a statement requiring bidders to make their own estimates of the facilities and difficulties attending the execution of the contract relieves the Government from liability for a breach of warranty or misrepresentation, has been many times decided against the Government.

United States v. Spearin, 248 U.S. 132, 39 Supreme Court 59.

Christie v. United States, 237 U.S. 234, 35 Supreme Court 565.

Hollerbach v. United States, 233 U.S. 165, 34 Supreme Court 553.

In the last cited case the Court says:

“A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True, the claimants might have penetrated the 7 feet of soft, slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority.

We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt."

(See also *Sheridan Kirk Contracting Co. v. United States*, 53 Court of Claims 82.)

III

Appellant's third proposition is that as a matter of law conceding that the Government did warrant the quality and quantity of the material available in the rock quarry which proved defective, that the contractor has no right of action for this breach of warranty, by virtue of the fact that Article 15 of the contract provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer subject to written appeal by the contractor to the head of the Department.

Before entering into the argument on this question, we wish to call the Court's attention to the wording of Article 15 of this contract, which reads as follows :

"Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions *of fact* arising under this

contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

(the italics are ours)

In the case of Callahan Construction Co. vs. United States, 91 Ct. Cls. 538, the court says:

"The rule is well established by the decided cases that in contracts of this character where, as in Art. 15, above mentioned, relating to disputes, it is provided that the decision of the contracting officer and the head of the department shall be final and conclusive only as to questions of fact, a decision or ruling on a protest or appeal which involves or is based upon an interpretation and construction of a contract and the specifications is a decision on a question of law rather than the determination of a fact and does not preclude the consideration, decision, and determination by the court of the question in controversy, including the facts. *Rust. Eng. Co. vs. U. S.*, 86 Ct. Cls. 461. In *Davis, et al, v. U. S.*, 82 Ct. Cls. 334, This Court held that * * * To the same effect is *Lyons v. U. S.* 30 Ct. Cls. 352, 353, 365, *Collings & v. U. S.*, 34 Ct. Cls. 294; *Albina Marine Iron Works, Inc. v. U. S.* 79 Ct. Cls. 714. In *Rust. Eng. Co. v. U. S.*, *supra*, this Court held under Article 15 of the contract, only decisions as to questions of fact by the contracting officer and the head of the department concerned, if an appeal was taken, were to be final and conclusive upon the parties. No appeal was required from any decision of the contracting officer, except as to questions of fact."

There are numerous other cases decided by both the Ct. Cls. and the Federal Courts which follow in line with the view expressed in the Callahan case. The case of *Plato v. U. S.*, 86 Ct. Cls. 665, presents a rather full discussion of the problem. This case dealt with a contract to construct a postoffice. The plaintiff did not present to the contracting officer for his decision during the progress of the work, at the time of its completion, or afterwards, any of the claims for damages asserted in the suit. The defendant contended, therefore, that the Court was without jurisdiction to consider the plaintiff's claim, and the plaintiff was precluded from recovery. The Court says:

“* * * The rule of law is well settled that it is competent for parties to a contract like the one here involved, to contract that the decision of the contracting officer, or other officer, of all specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that in the absence of fraud or mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the Courts, and that a contractor who fails to avail himself of his right to submit such questions of fact to the contracting officer for decision will not be granted relief by the courts. The defendant has correctly stated the law on this subject in its brief. However, it has nowhere been held by this court, or the Supreme Court, that claims for damages resulting to a contractor because of delays on the part of the Government are of the character of disputes contemplated in Article 15 of the contract which are to be submitted to and decided by the contracting officer, or his duly authorized representative.

"This court, has recently decided that precise question in *Phoenix Bridge Co. v. U. S.* No. 42084, 85 Ct. Cls. 603. Article 15 of the contract in that case relating to disputes was quite similar to Article 15 of the instant case. The Government in that case contended that as a prerequisite to suit, a claim of damages arising out of delay on the part of the Government had to be presented to the contracting officer for decision. The Court rejected this contention:

"Counsel for defendant appear to contend that the Court may not award plaintiff damages for delay caused by the defendant for the reason that plaintiff did not submit its claim for unliquidated damages to the contracting officer. But there was no provision in the contract requiring that this should be done as a condition to plaintiff's right to sue, or as a condition to the exercise of jurisdiction over the claims by the court. Article 15 of the contract related to disputes but makes no reference to the matter of submission of *claims for damages for delays caused by the defendant*. Article 9 of the contract provided that plaintiff should notify the contracting officer of the delays and that such officer should ascertain the facts and extent of the delay but does not provide for the submission of damage claims for such delays. Paragraph 20 of the specifications related to the filing of protests. Article 3 of the contract and Article 5 related to extra work. None of these provisions required plaintiff to submit to the department his claims for the amount of damages for delays. In *Clyd v. U. S.*, 13 Wall. 35, 39, the Court held that to require claimants to first submit their claims to the department was establishing a jurisdictional requirement which Congress alone had the power to establish."

"This Court has held in cases too numerous for citation here that where a contractor is delayed by the Government in the prosecution of work un-

der a contract, he is entitled to recover as damages the expense and costs incurred by reason of such delays. The Government is not relieved from liability by merely extending the contractor's time for the completion of the contract."

In the case of *Davis, et al. v. U. S.*, 82 Ct. Cls. 334, the Court used similar language:

But the disputed question here—whether the plaintiff under the terms of the contract was required to furnish the materials demanded by the contracting officer—was not one of fact. It was a disputed question of law—the proper construction of the contract.
* * * * This question was outside of the province of the officer, or the head of the department is being the province of the Court to declare the law of the contract

See also *Smoll v. U. S.*, 91 Ct. Cls. 1; *McCloskey v. U. S.*, 66 Ct. Cls. 105; *Collins & Farwell v. U. S.*, 34 Ct. Cls. 294.

Appellant cites the recent case of *United States v. Blair*, 321 U.S. 730, 88 Law Edition 1039, as its leading authority for the propositions advanced by it. The language of that contract, which was under consideration and construed by the Court, was very different from the language used in this contract. Article 15 of that contract provides that "all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative subject to written appeal by the contractor within 30 days to the head of the de-

partment concerned". It will thus be seen that the contractor in that case agreed to submit not only questions of fact but any dispute arising under the contract to the decision of the contracting officer. However, the question decided in that case would refer to questions of fact and not of law, the question of fact being whether or not extra work was required of the contractor during its progress, so that case establishes no precedent for the propositions of law herein advanced by the appellant.

In the two Court of Claims cases, *Reco Building Corporation v. U. S.*, 99 Ct. Cls. 445 and in the *Silas Mason v. U. S.* case (Ct. Cls. No. 44659), from the same Court, the Court was considering and construing a proposition of a contract identical to that in the Blair case decided by the United States Supreme Court, but notwithstanding in the Reco case the Court examines the decisions of the contracting officer and finds that the decisions were in fact correct and proper under the contract. In the Silas Mason case the very quotation set out by Appellant in its brief at page 27 shows the Court there recognized a distinction between Article 15 as incorporated in the contract in that case and Article 15 as written in the contract under consideration here, and impliedly the Court holds that had Article 15 in that case been identical with Article 15 in our case, the resulting decision would have been different. On this phase of the argument we must conclude that under the con-

tract as written in this case, Appellee was not required to submit to any administrative officer for determination the legal question of whether or not the specifications in this case constituted a warranty of adequacy and fitness of the quarry furnished, and the further question of whether or not that warranty had been breached and the District Court of the United States had jurisdiction in the first instance to determine that question.

IV AND V

Appellee will discuss the last two numbered divisions of the argument in Appellant's brief under one heading as these Assignments of Error all attack the sufficiency of the evidence to sustain the Findings of Fact of the Trial Court. Appellant does not claim that there is no evidence to support these Findings but asks the Court to weigh the evidence and determine that the Trial Court erroneously found that the evidence preponderated in favor of the Appellee. It is a well-settled rule of Appellate procedure that no Circuit Court of Appeals will disturb Findings made by a Trial Judge upon contested facts depending upon the weight of the evidence or the veracity of the witnesses. 54 Am. Jur. 937. Foot note 5 on the page last cited, sets forth a long line of cases so holding and we will not burden the Court in this brief with further citations except to quote a typical case from the foot note:

"In *Deputy v. Du Pont*, 308 U.S. 488, 84 L. ed. 416, 60 S. Ct. 363, it was held that where the District Court has decided in interpreting the Federal income tax law that payments claimed to be deductible did not proximately result from, and were not ordinary expenses for the conduct of, the taxpayer's business, it was error for the Circuit Court of Appeals to reverse the judgment on that ground."

The Rules of Civil Procedure promulgated by the Supreme Court carry that well established rule into effect in Rule 52, a portion of that rule reading:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Appellant's Assignment of Error 17 towards which its entire subdivision IV of the argument is directed is an attack on the following Findings of Fact of the Court:

VIII

"That the failure of the government to furnish to plaintiff adequate and satisfactory quarries at the place designated in the call for bids and specifications resulted in delaying the completion of the project and made it impossible for the plaintiff to complete the project within the time limit provided in the contract and prior to the winter of 1937, and defendant assessed against plaintiff a penalty of liquidated damages in the sum of \$1,575.00.

IX

"That due to the fact that plaintiff could not pro-

duce satisfactory crusher run material from the said quarry he was unable to complete the surface course material for the full southerly half of the job from the said quarry, and which required him to haul a considerable portion of the surface course material from the gravel pit approximately .5 of a mile right of Station 870 to complete the work that he should have been able to have completed from the rock quarry set-up, causing him extra cost due to the longer haul in the amount of \$956.48."

Thus it will be seen upon all of the evidence presented the Trial Court found that the delay which prevented the contractor from completing his work in the fall of 1937 was attributable to the breach of warranty by the Government, and that had the rock quarry been as warranted Appellee would have completed his contract within the time limit set forth in the contract; that he had completely performed the work of processing and shaping the roadway and the gutters in 1937 and was compelled to do the work over without additional compensation in 1938. Appellant conceded that there is evidence in the record supporting the findings but says, on Page 29 of its brief, "There was an equal showing on the Government's part that the Appellee's failure to proceed diligently prevented completion of the work in 1937 and was as great a reason for his losses as the lack of quality gravel". This is manifestly a direct request that this Court weigh the evidence and substitute its Findings for the Findings of the Trial Court, however, we have already quoted extensively from the testimony show-

ing that had the quarry designated in the specifications been as warranted, Appellee could have completed his contract in full within 45 days after commencing crushing operations. The Court must also keep in mind the fact that no evidence was offered by the Government to in any way minimize the amount of damages proved by the Appellee. That it did cost Appellee \$2,850.17 to reprocess and reshape the roads, stands undisputed in the record.

The same argument applies to all of the other items of damage allowed by the Court and attacked by Appellant in this appeal. The \$956.48, the extra cost of the hauling, is undisputed. The \$4,618.34 being the extra cost of producing oil rock which would not have been incurred had Appellee been able to produce any oil rock from the rock quarry, and certainly the \$1,575.00 which the Government wrongfully assessed against the Appellee as liquidated damages for late completion is undisputed. The only argument by Appellant on these items is that the Court erroneously found that these damages were incurred due to the fault of the Government in specifying the rock quarry and in constantly insisting that Appellee attempt to operate it to produce the material needed for the contract.

CONCLUSION

In conclusion Appellee respectfully submits that the testimony in this case reveals the fact that the engineers for the Government made an error when they designated this quarry as being available for the production of the material required by the contract; that stubbornness or pride of opinion made those Government agents persist in insisting that proper material could be produced from that quarry, and that this attempt on the part of the contractor to comply with their directions and requests caused him loss and damage in an amount in excess of the damage awarded to him by the Trial Court and that rather than await the long and costly litigation involved in a suit to recover his entire damages by seeking redress in the Court of Claims, he brought this action in the District Court of his residence waiving any claim in excess of the jurisdiction of the District Court, that the Trial Court properly found that he was so damaged and that fault lay with the Government, that the Findings of Fact are correct and the judgment entered is a proper and just one and should be affirmed by this court.

JOHN LIGHTY,
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Portland, Oregon.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

HOMER G. JOHNSON,
Appellee.

APPELLANT'S PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States for the District of Oregon.

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Portland, Oregon,
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PAUL P. O'BRIEN,
CLERK

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No. 11026

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

HOMER G. JOHNSON,

Appellee.

APPELLANT'S PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States for the District of Oregon.

**PETITION FOR REHEARING ON BEHALF
OF THE UNITED STATES OF AMERICA**

COMES NOW the Appellant, the United States of America, before this Honorable Court and respectfully petitions the Court for a rehearing of this cause and for grounds thereof avers that the Circuit Court of Appeals for the Ninth Circuit in its opinion of February 15, 1946, committed errors in that the Court

misapprehended and overlooked assignment of error No. 1 in the said cause. In this prayer for rehearing the Appellant is mindful of the rules of this Court that its appearance shall be brief and not in repetition of contentions formerly submitted to the Court. The Appellant now prays the indulgence of the Court to be permitted to submit the following additional points and authorities which might have been of assistance to the Court had they been submitted in Appellant's original brief in this case. It is respectfully submitted that the following principles would bear upon the issues considered by the Court in its former opinion and that they were not brought to the attention of the Court for its assistance upon its former consideration of this cause.

POINT I

The opinion of this Court rendered in this cause controverts the principle that the District Courts shall only have concurrent jurisdiction with the Court of Claims when all of the claims do not exceed \$10,000.

STATEMENT OF THE CASE

The Appellee-Plaintiff was awarded damages growing out of a contract with the United States for the construction of some 16 miles of highway.

In the District Court the Appellee amended his complaint alleging damages in excess of \$14,000. His

claim was made up of eight different elements of damage. He gave proof on the total \$14,994.72 of damages.

The Appellee waived his right to recovery in excess of \$10,000 by only asking judgment for this amount.

Upon appeal to this court the judgment was affirmed.¹

The petition for rehearing is limited to one question:

*Did the District Court have jurisdiction within the meaning of the Tucker Act?*²

The United States may be sued only as it gives its statutory consent.³ The Tucker Act constitutes a waiver of government immunity to suit and gives the District Court sitting as a legislative court concurrent jurisdiction with the Court of Claims of all claims not exceeding \$10,000.00 against the United States.⁴

Statutes waiving sovereign immunity from suit are strictly construed.⁴ The Court of Claims is the proper court in which to present claims against the United States. However, Congress saw fit to permit recovery against the United States in a claimant's home district providing the claim did not exceed \$10,000. The District Court has no jurisdiction to deter-

¹*U. S. v. Homer G. Johnson*, #11,026, February 15, 1946.

²28 U.S.C.A., Sect. 41 (20).

³*U. S. v. Shaw*, 309 U. S. 495, 500, 501.

⁴*U. S. v. Sherwood*, 312 U. S. 584.

mine claims in excess of the statutory limitations. It has no discretion but to dismiss an action when the claim exceeds \$10,000.⁵

So, if a plaintiff presents a complaint and the items of claim exceed \$10,000, the District Court is without jurisdiction. The Appellee in the case before the court contends that by not asking judgment in more than the jurisdictional amount of \$10,000, the defect is cured.

The Appellee did not waive any specific item of claim nor was any particular item remitted or abated. The court heard evidence on the entire items of damage aggregating \$14,994.72. It was necessary for the court to pick such items as he felt the plaintiff was entitled to recover in reaching the judgment. The court was required to pass upon interchangeable items of claim aggregating over \$10,000. We contend the court was without jurisdiction to do this.

Upon appeal the Government was obliged to attack every item of claim, aggregating \$14,994.72.⁶ The very purpose of the Tucker Act was to require cases where Government must attack items of claim exceeding \$10,000 to be brought in the Court of Claims. Had there been a specific remission or abatement by the Appellee of some of the items, then there would have been no need to contest each item on appeal.

⁵*Franklin v. United States*, 308 U. S. 516; *Hammond-Knowlton v. United States*, 121 Fed. (2d) 192.

⁶*The Chickasaw Nation v. United States*, Supreme Court of U. S. #170.

It was further apparent from the statement of Appellee's counsel that his avowed purpose was not to reduce the aggregate claim but only the amount of the judgment.⁷

While it is true that the courts have previously sustained waivers in order to comply with jurisdictional amounts, these cases are different from the case at bar.

In the cases of *Hill v. United States*, 40 Fed. 441, and *W. E. Hedger Co. v. United States*, 42 Fed. (2d) 553, the waiver of remission was of a specific portion of the claim. In these two cases the Government was not obliged to attack claims in excess of \$10,000 on appeal. We believe a sharp distinction can be drawn between situations where specific portions of claims are waived so as to obtain jurisdiction and merely a waiver of judgment in excess of a certain amount.

A recent case, *McMichael v. United States*, 63 Fed. Sup. 598, illustrates to our minds, at least, the technical requirements that must be met in acquiring jurisdiction under the Tucker Act.

In *The Chickasaw Nation v. United States*, No. 170, October Term, 1945, the Court of Claims offset an amount of \$22,858.78 allowed by items of gratuity expenditures totaling \$69,920.39. In reversing this, the Supreme Court said, "Indian claimants desirous of challenging the allowed offsets on appeal must be prepared to attack all items which make up the fund,

⁷Tr. p. 305, Appellant's Brief, p. 13.

however much it may exceed their claims." The analogy to our case seems apparent.

For the reasons stated we are of the opinion that the District Court was without jurisdiction and should have dismissed the Appellee-Plaintiff's complaint. The Petition for Rehearing should be granted.

Respectfully submitted,

HENRY L. HESS,
United States Attorney
for the District of Oregon,
506 U. S. Court House,
Portland, Oregon.

J. ROBERT PATTERSON,
Assistant United States Attorney.

I hereby certify that in my opinion, as counsel herein, the grounds for the foregoing Petition are well founded in law and that the same is not interposed for delay and that it is proper to be presented and filed.

.....
Of Counsel for Appellant-Petitioner.

No. 11027

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. URI & CO., a Copartnership; GEORGE URI
and MRS. HOUSTON, copartners, doing business
under the name of F. Uri & Co.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAY 24 1945

PAUL P. O'BRIEN,
CLERK

No. 11027

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. URI & CO., INC., a Corporation,
Appellant,
vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Southern Division

No. 23180G Civil

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

F. URI & CO., INC., a Corporation,

Defendant.

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

COUNT ONE

1. In the judgment of the Price Administrator, the defendant has engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2d Sess., c. 26, 50 U.S.C.A. apx. 901, et seq.), hereinafter called "the Act", in that it violated Revised Maximum Price Regulation No. 169, as amended,—Beef and Veal Carcasses and Wholesale Cuts, effective in accordance with the provisions of said Act; and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Section 4(a).

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

3. At all times mentioned herein there has been in effect, pursuant to said Act, Revised Maximum Price Regulation No. 169, as amended, (7 F.R. 10381) establishing maximum prices for beef and veal fabricated cuts.

4. Between the 1st day of August, 1943, and the 1st day of February, 1944, defendant sold at wholesale and delivered beef and veal fabricated cuts at prices in excess of those established by said Maximum Price Regulation No. 169, as amended.

COUNT TWO

1. The allegations of paragraphs 1 and 2 of Count One herein are incorporated by reference as if fully set forth.

2. At all times mentioned herein there has been in effect, pursuant to the Act, Revised Maximum Price Regulation No. 239, as amended,—Lamb and Mutton Carcasses and cuts at wholesale and retail (7 F.R. 10688), establishing maximum prices for lamb and mutton fabricated (hotel supply) cuts.

3. Between the 1st day of August, 1943, and the 1st day of February 1944, defendant sold at wholesale and delivered lamb fabricated (hotel supply) cuts at prices in excess of those established by Revised Maximum Price Regulation No. 239, as amended.

COUNT THREE

1. The allegations of paragraphs 1 and 2 and 3 of Count One and paragraph 2 of Count Two herein are incorporated by reference as if fully set forth.

2. During all times herein mentioned Section 1364.415(a) of said Revised Maximum Price Regulation No. 169, as amended, provided in respect to beef and veal, and Section 1364.168(a) of Revised Maximum Price Regulation No. 239, as amended, provided in respect to lamb and mutton, that no hotel supply house or wholesaler of meat shall seal and deliver to purveyors of meals during any three-month period beginning June 1, September, or December 1, or March 1, a volume of fabricated meat cuts (hotel supply cuts) of all kinds in excess of 70 percent of the total volume by weight of all kinds and type of meats sold and delivered by such selling establishment from September 15, 1942, through December 15, 1942, to purveyors of meals other than sales to War Procurement Agencies.

3. That from September 15, 1942, through December 15, 1942, defendant sold and delivered to purveyors of meals other than to War Procurement Agencies, 339,779 pounds of meat; for the three month period, beginning September 1, 1943, defendant sold and delivered to purveyors of meals, other than War Procurement Agencies, 321,664 pounds of fabricated meat cuts; that said sales of fabricated meat cuts exceeded 70 per cent of the total volume by weight of all kinds of meat sold and delivered by defendant to purveyors of meals from September 15, 1942, through December 15, 1942, other than sales to War Procurement Agencies.

COUNT FOUR

1. The allegations of paragraphs 1, 2, and 3 of Count One and paragraph 2 of Count Two herein are incorporated by reference as if fully set forth.

2. At all times herein mentioned Section 1364.407(b) of Revised Maximum Price Regulation No. 169, as amended, and Section 1364.173(a) of Revised Maximum Price Regulation No. 239, as amended, provided that every person making a sale of any beef or veal wholesale cuts, or other meat items subject to said Revised Maximum Price Regulation No. 169, as amended, and every seller making sales or deliveries of lamb or mutton cuts, subject to Revised Maximum Price Regulation No. 239, as amended, shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, is in effect, complete and accurate records of each such sale or delivery, showing, among other things, the grade of each type of meat cut sold.

That defendant subsequent to the 1st day of August, 1943, made numerous sales of beef and veal wholesale and fabricated cuts, and lamb and mutton cuts, but failed to keep for inspection by the Office of Price Administration accurate records of each such sale or delivery, showing the grade of each type of meat cut sold.

COUNT FIVE

1. Plaintiff, as Administrator, Office of Price Administration, brings this action for treble dam-

ages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2d Sess., c. 26, 56 Stat. 23) enacted January 30, 1942, hereinafter called "the Act."

2. Jurisdiction of this Court is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

3. At all times herein mentioned there has been in full force and effect, pursuant to the Act, Revised Maximum Price Regulation No. 169, as amended,—Beef and Veal Carcasses and Wholesale Cuts (7 F.R. 10381), and Revised Maximum Price Regulation No. 239, as amended,—Lamb and Mutton Carcasses and Cuts at Wholesale and Retail (7 F.R. 10688).

4. Between the 1st day of August 1943, and the 1st day of February, 1944, defendant sold at wholesale and delivered beef and veal fabricated cuts at prices in excess of those established by said Revised Maximum Price Regulation No. 169, as amended.

5. Between the 1st day of August, 1943, and the 1st day of February, 1944, defendant sold at wholesale and delivered lamb fabricated (hotel supply house) cuts at prices in excess of the Maximum prices established by Revised Maximum Price Regulation No. 239, as amended.

6. None of said purchases was made for use or consumption other than in the course of trade or business.

7. Three times the aggregate amount by which the prices received by the defendant in the transactions referred to in paragraphs 4 and 5 of this Count exceed the maximum prices provided by said Regulations equals \$32,864.34.

Wherefore, the Administrator Demands:

1. A permanent injunction enjoining the defendant, its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with the defendant from:

Directly or indirectly selling, delivering, or offering for sale or delivery, any beef, veal, lamb or mutton wholesale or fabricated cuts at prices in excess of those established by Revised Maximum Price Regulation Nos. 169 and 239, both as amended, or otherwise violating or attempting or agreeing to do anything in violation of either of said Regulations or in violation of any Regulation or Order adopted pursuant to the Emergency Price Control Act of 1942 establishing maximum prices for any of said meat items.

2. A permanent injunction enjoining the defendant, its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with the defendant from:

Selling and delivering to purveyors of meals other than the War Shipping Administration and/or contract schools, during any three months quota period, beginning June 1, September 1, December 1, or March 1, a total volume by weight of fabricated meat cuts and/or ground beef and miscellaneous beef items and/or boneless and miscellaneous veal cuts in excess of 90 per cent of the

total volume by weight of beef, veal, lamb and mutton, not including canned meats of any kind, variety meats and edible by products of any kind and/or sausage and similar products thereof sold or delivered by defendant from September 15, 1942, through December 15, 1942 to purveyors of meals other than to War Procurement Agencies.

3. A permanent injunction requiring and directing the defendant, its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with the defendant, to keep for inspection by the Office of Price Administration for so long as the Emergency Price Control act of 1942, as amended, is in effect, complete and accurate records of each sale of beef or veal, wholesale or fabricated cuts, showing the data as required by Section 1364.407(b) of Revised Maximum Price Regulation No. 169, as amended, and complete and accurate records of each sale of lamb wholesale or fabricated cuts showing the data as required by Revised Maximum Price Regulation No. 239, as amended, showing among other things, the grade of each meat cut sold.

4. Judgment on behalf of the United States against the defendant in the sum of \$32,864.34.

5. Such other, further, and different relief as to the Court may seem just and proper in the premises.

Dated: February 29, 1944.

(sgd) GEORGE MONCHARSH

(sgd) THOS. C. RYAN

[Endorsed]: Filed Feb. 29, 1944.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

COUNT ONE

Come now the defendant above named and answers the complaint; Defendant Admits, Denies and Alleges as Follows:

As to Count One, Defendant admits the allegations contained in paragraphs 2 and 3. Defendant denies generally and specifically each and every other allegation contained in [7] paragraphs 1 and 4 of said Count 1.

Answering Count 2, Defendant Admits, Denies and Alleges as Follows:

Defendant admits the allegation contained in paragraph 2. Defendant hereby refers to and incorporates herein by reference in answer to paragraph 1 of Count 2, each and all of the provisions of the forthcoming answer to the complaint which are in defense to paragraphs of plaintiffs Count 1 which are incorporated by reference thereto into plaintiff's Count 2. Defendant denies generally and specifically each and all of the allegations contained in paragraph 3.

Answering Count 3, Defendant Admits, Denies and Alleges as Follows:

Defendant hereby refers to and incorporates herein by reference in answer to paragraph 1 of Count 3 each and all of the provisions of the foregoing answer to the complaint which are in defense to paragraphs of plaintiff's Counts 1 and 2 which

are incorporated by reference thereto into plaintiff's Count 3.

Defendant admits the allegations contained in paragraph 2.

Defendant denies generally and specifically each and all of the allegations contained in paragraph 3.

Answering Count 4, Defendant Admits, Denies and Alleges as Follows:

Defendant hereby refers to and incorporates herein by reference in answer to paragraph 1 of Count 4 each and all of the provisions of the foregoing answer to the complaint which are in defense to paragraphs of plaintiff's Counts 1 and 2 which are incorporated by reference thereto into plaintiff's Count 4.

Defendant admits the allegations contained in paragraph 2.

Defendant denies generally and specifically each and [8] all of the allegations contained in paragraph 3.

Answering Count 5, Defendant Admits, Denies and Alleges as Follows:

Defendant admits the allegations contained in paragraphs 1, 2 and 3.

Defendant generally and specifically denies each and all of the allegations contained in paragraphs 4, 5, 6 & 7.

Wherefore, defendant prays that plaintiff take nothing by his complaint and that said complaint be dismissed with costs to defendant and that defendant shall have such other and further relief as may be meet and proper in the premises.

Dated: San Francisco, California, May 4, 1944.

EDMOND F. MAHER

Attorney for Defendant.

Service of Copy of Above Answer Acknowledged
This Sixth Day of May, 1944.

THOMAS C. RYAN

GEORGE A. FARADAY

W. H. BRUNNER

Attorneys for Plaintiff.

[Endorsed]: Filed May 8, 1944. [9]

[Title of District Court and Cause.]

MEMORANDUM DECISION ON PRE-TRIAL
ORDER

The question submitted by the parties for the determination of the Court, upon pre-trial conference in this case, arises out of the issue made by the complaint of the Price Administrator filed February 29, 1944 and the answer of the defendant filed May 8, 1944.

By the complaint, the Administrator seeks treble damages under Section 205-e of the Emergency Price Control Act of 1942 and an injunction under Section 205-a of the Act. The Administrator claims that the defendant infringed, during the periods stated in the complaint, revised maximum price regulation #169 (as amended by amendments 12 and 16) and revised maximum price regulation 239 (as amended by amendment 7). Said price regula-

tions were promulgated by the Administrator pursuant to the authority vested in him under Section 2-a [10] of the Act. The infraction charged is that defendant sold meats at the higher prices allowed to those having the status of a "hotel supply house" at a time when defendant was not entitled to such status.

Hotel Supply House

"Hotel supply house" is defined in the regulations as follows:

" 'Hotel supply house' means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible by-products to purveyors of meals; and which during the period September 15, through December 15, 1942 sold to purveyors of meals, other than war procurement agencies, 70 per cent of the total weight volume of meat, variety meats, or edible by-products sold by it."

The Administrator has interpreted the regulation to mean that a "hotel supply house" loses its status as such if it sells meat to any but purveyors of meals. (See Price Interpretation #29 issued by the Office of Price Administration, some months after the promulgation of the regulation.)

Wide latitude is granted to the Administrator, with respect to the format of the regulations, under Section 2-c of the Act which provides: "Any regu-

lation or order under this section may be established in such form and manner, may contain such classification and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act.”

The defendant contends that the regulation per se does not admit of the interpretation placed upon it by the Administrator. It is claimed that the last clause of the regulation, beginning with the words, “and which,” indicates that a “hotel supply house” even though required to be a “separate selling establishment” need not sell to purveyors of meals more than the amount of meat so sold during the base period designated in the regulation. [11]

The rules of construction to be here invoked are not the orthodox criteria applied to private contracts or in ordinary litigation. Technical dissection of language, and niceties resting upon punctuation, have no judicial appeal. The regulation must be considered in the light of the extraordinary objectives of a statute engendered by emergency and “as conditioned by the necessities of the public interest which Congress has sought to protect.” (*Hecht v. Bowles*, 321 U.S. 321, at 330.)

It is conceded that if the regulation means what the Administrator claims, the defendant has infringed the same. With the validity of the regulation, this Court has no concern. (Section 204-d of the Act.) The Court is here called upon to determine the meaning of the regulation only for the

purpose of deciding whether defendant has infringed as charged in the complaint.

By the regulation, it seems clear to the Court the Administrator intended to give a separate status to those engaged in selling meat to purveyors of meals. The "statement of considerations," issued by the Administrator pursuant to Section 2-A of the Act, indicates some of the factors underlying and justifying such purpose and intent. Meat purveyors, a substantial amount of whose sales during the base period, were to purveyors of meals, are granted by the regulation the status of a "hotel supply house," if they maintain a separate selling establishment devoted to that business. There appear to be adequate administrative bases for this requirement. Difficulty of enforcement to attain the objectives of the law alone appears to be an adequate reason. Designating "a hotel supply house" in the regulation as "a separate selling establishment" would seem to have no other reasonable purpose than that of exclusion of any other selling activity. [12]

Having in mind the objectives of the Act and the power and duties therein delegated to the Administrator, I am satisfied that the regulation clearly means what it says. The defendant must maintain a "separate selling establishment" devoted to sales to purveyors of meals in order to maintain the status of "a hotel supply house."

A pre-trial order may be prepared in accordance with the views expressed by the Court.

The Court desires to make this further comment: Plaintiff seeks both treble damages and an in-

junction. Thus is raised a question which should be resolved by the Court in the light of the nature of the power vested in the Court in the enforcement of this statute. This subject is clarified by the decision of the Supreme Court in *Hecht v. Bowles*, *supra*. It may be that both remedies may be allowed or that only one of the two remedies sought is proper. On the other hand it may be that some "other order" as provided in Section 205-a of the Act would more fully meet the "standards of public interest," under the special circumstances of this case. In *Hecht v. Bowles*, the Supreme Court indicated, even though it was there only considering Section 205-a of the Act, that it was desirable that full opportunity should be afforded for equity courts to treat enforcement proceedings in accordance with traditional equity practices. Therefore counsel are advised that the Court does not feel that it can justly determine the proper remedy to be allowed in this case until further light is thrown upon the issues at the trial of the cause.

[Endorsed]: Filed July 11, 1944. [13]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on for pre-trial conference before the Honorable Louis E. Goodman, Judge of the United States District Court, on Saturday, May 27, 1944. W. H. Brunner, Esq., appearing as attorney for the plaintiff and Edmond F. Maher, Esq., appearing as attorney for the Defendant.

Based upon proceedings at said pre-trial conference, it is ordered as follows:

1. Upon stipulation of parties the caption of the complaint in said action be and the same is hereby amended to substitute in the place of F. Uri & Co., Inc., a corporation, the names of George Uri and Mrs. Houston, co-partners, doing business under the name of F. Uri & Co., and it is further stipulated that both defendants are appearing in this action with Edmond F. Maher as their attorney.

2. On motion of plaintiff and with the consent of defendant Count Four alleged in plaintiff's complaint be and the [14] same is hereby dismissed.

3. That at the pre-trial conference certain facts were stipulated, as set forth in this paragraph:

(a) During the base period September 15, 1942 to December 15, 1942, defendants qualified as a "hotel supply house" by selling and delivering to purveyors of meals, other than war procurement agencies, more than 70% of all meats sold by them.

(b) That from August 1, 1943 to February 1, 1944, defendants sold and delivered to purveyors of meals other than to war procurement agencies more than 70% but less than 100% of the total weight of meats sold by them, the balance being sold to other than purveyors of meals.

(c) That all of said sales and deliveries, both during the base period and subsequent to August 1, 1943, were made by said defendants out of one place of business located at 517-521 Clay Street in the City and County of San Francisco, State of California.

(d) That about the 1st of February, 1944, de-

defendants discontinued the practice of selling its surplus meats to others than purveyors of meals, and thereafter proceeded to sell and deliver only to purveyors of meals and war procurement agencies out of such business establishment.

4. That under the facts set forth in Paragraph 3 of the order, and pending the submission of further evidence at the trial of this action, the Court holds that when defendants made their first sales and deliveries of meat to persons other than purveyors of meals subsequent to August 1, 1943, the said defendants lost their status as a "hotel supply house", as defined in Section 1364.455 (b) (1) of RMPR 169, as amended by Amendment 12; with reference to veal as defined in Section 1464.470 (b) (1) of RMPR 169 as amended by Amendment 12; or with reference to lamb [15] and mutton as defined in Section 1364.160 (a) (5) of MPR 239 as amended by Amendment 7, and did not regain the status as a "hotel supply house" prior to February 1, 1944.

5. That the further hearing and trial of said action be and the same is hereby set for August 25, 1944.

6. The Court reserves the right to modify or amend this order at the time of trial.

Dated this 25th day of August, 1944.

LOUIS E. GOODMAN

Judge of the United States
District Court.

[Endorsed]: Filed Aug. 25, 1944.

[Title of District Court and Cause.]

STIPULATION AS TO FACTS

It Is Stipulated and Agreed between the parties hereto as follows:

1. That between August 1, 1943 and February 1, 1944, the period covered by plaintiff's complaint, defendant sold and delivered to purveyors of meals the following poundage of fabricated meat cuts at the maximum prices allowed for a "hotel supply house" in Revised Maximum Price Regulations Nos. 169 and 239:

280,668 pounds beef

43,920 pounds lamb

16,858 pounds veal

341,446 pounds Total

2. That the first sale of meat during said period, made by defendant to other than purveyors of meals, took place [17] on August 3, 1943 to P. Micheletti Co., 516 Davis Street, San Francisco, California. That prior to said sale to said P. Micheletti Co. on said date, defendant had sold to purveyors of meals 3,681 pounds of fabricated meat cuts.

3. That the maximum prices which defendant could have charged for such sales and deliveries as a "hotel supply house" averaged 2 cents per pound higher than those which he could have charged as a wholesale seller other than a "hotel supply house," and therefore for the purposes of this action 2 cents per pound is to be considered

the proper differential to be used in computing any overcharges which the Court may determine were made by defendant in making such sales and deliveries.

Dated this 25th day of August, 1944.

THOMAS C. RYAN

W. H. BRUNNER

Attorneys for Plaintiff

EDMOND F. MAHER

Attorney for Defendant

[Endorsed]: Filed Aug. 25, 1944. [18]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial Friday, August 25, 1944 before the Honorable Louis E. Goodman, Judge of the United States District Court. The plaintiff was represented by W. H. Brunner, Esq., and defendants by Edmond F. Maher, Esq. After both oral and documentary evidence was offered on behalf of both parties and the matter having been submitted to the Court for decision, the Court finds as follows:

FINDINGS OF FACT

1. All the matters, facts and things alleged and set forth by plaintiff in Counts One and Two of plaintiff's complaint are and each of them is true.
2. That there is no evidence before the Court to [19] establish the allegations of Counts Three and Four of plaintiff's complaint, and the Court finds

that said counts of said complaint were abandoned by plaintiff during the course of trial.

3. As to Count Five of plaintiff's complaint the Court finds as follows:

(a) That all of the matters, facts and things alleged and set forth by plaintiff in paragraphs 1, 2 and 3 of Count Five of plaintiff's complaint are and each of them is true.

(b) That during the period September 15, 1942 to December 15, 1942 defendants qualified as a "hotel supply house" under Revised Maximum Price Regulations Nos. 169, and 239, both as amended, by selling and delivering to purveyors of meals other than war procurement agencies more than 70 per cent of all meats sold by defendants from a single selling establishment located at 517-521 Clay Street, in the City of San Francisco, California.

(c) That between the 1st day of August, 1943 and the 1st day of February, 1944, defendants sold and delivered to purveyors of meals other than war procurement agencies more than 70 per cent, but less than 100 per cent, of the total weight of meats sold and delivered by them out of their place of business located at 517-521 Clay Street, in the City and County of San Francisco, State of California, from which said place of business they likewise sold and delivered meat items to purchasers other than purveyors of meals, to-wit, to butchers. That during said period defendants sold the following poundage of fabricated meat cuts to purveyors of meals at the maximum prices allowed under Revised Maxi-

imum Price Regulations Nos. 169 and 239, both as amended, for sales of such fabricated meat cuts by a "hotel supply house:"

280,668 pounds of beef

43,920 pounds of lamb

16,858 pounds of veal

Total 341,446 pounds [20]

(d) That the first sale of meat during said period made by defendants to sellers other than purveyors of meals took place August 3, 1943 to P. Micheletti & Co., 516 Davis Street, San Francisco, California. That prior to said sale to said P. Micheletti & Co. on said date defendants had sold to purveyors of meals 3,681 pounds of fabricated meat cuts at the maximum prices allowed under Revised Maximum Price Regulations Nos. 169 and 239, both as amended, for sales of such fabricated cuts by hotel supply houses.

(e) That as a matter of law, the result of said sale to P. Michelette & Co. was that defendants lost their status as a "hotel supply house" under Revised Maximum Price Regulations Nos. 169 and 239, both as amended, and that thereafter, during the period covered by this action, the maximum prices which defendants could lawfully have charged purveyors of meals for fabricated cuts under said Regulations were the maximum prices permitted to be charged to purveyors of meals by packing or slaughtering plants, packing branch houses, wholesalers, or other selling establishments, rather than those permitted to be charged to pur-

veyors of meals by a "hotel supply house." That the said prices which defendants could lawfully have charged as aforesaid averaged 2 cents per pound less than the prices actually charged by defendants. That for the purposes of this action and on stipulation of counsel the Court finds that 2 cents per pound is the proper differential to be used in computing any overcharges made by defendants.

(f) That during the period between August 1, 1943 and February 1, 1944 defendants sold and delivered to purveyors of meals 337,765 pounds of fabricated meat cuts at maximum prices 2 cents per pound higher than the maximum prices allowed for such sales to packing or slaughtering plants, packing branch [21] houses, wholesalers, or other selling establishments under Revised Maximum Price Regulations Nos. 169 and 239, both as amended, which resulted in an actual overcharge of \$6,755.30.

(g) That the violations found by the Court to have been made herein were neither wilful nor the result of the failure of defendants to take practicable precautions against the occurrence of the violations.

(h) That defendants conducted no other operations than the fabrication of meats; the sale of fabricated cuts, variety meats and edible by-products to purveyors of meals and government procurement agencies; the sale of primal cuts to butchers; and the sale of bones, scraps, and fats to renderers and glue factories. That all sales of primal cuts made by defendants to butchers were made at defendants' costs without any mark-up or

profit whatsoever. That all sales of scraps, bones, and fats were made at the proper ceiling prices therefor.

(i) That the violations complained of by plaintiff ceased on or about February 1, 1944 in that defendants at said time discontinued the practice of selling meats to others than purveyors of meals, and thereafter and now are selling and delivering meats only to purveyors of meals at the maximum prices permitted under said Regulations to "hotel supply houses."

(j) That there is no evidence from which the Court could find that there is a likelihood of the practices complained of being resumed by defendants and therefore injunctive relief is unnecessary.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings of fact, the Court concludes:

1. That plaintiff is entitled to a judgment against defendants on behalf of the United States for the sum of \$6,755.30. [22]

2. That plaintiff's application for injunction should be denied without prejudice.

3. That the Court should retain jurisdiction of this cause with leave to plaintiff on notice to renew his application for injunctive relief upon a showing of any further violations on the part of the defendants of any applicable price regulations applying to the sale and delivery of meat items.

Let judgment be entered accordingly.

Dated this 27th day of November, 1944.

LOUIS E. GOODMAN

Judge of the United States
District Court

Receipt of a copy of the within proposed Findings of Fact and Conclusions of Law are admitted this 21st day of November, 1944.

EDMOND F. MAHER

[Endorsed]: Filed Nov. 27, 1944. [23]

In the District Court of the United States, Northern District of California, Southern Division

No. 23180-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

GEORGE URI and MRS. HOUSTON, co-partners,
doing business under the name of F. URI
& CO.,

Defendants.

JUDGMENT

The above entitled action came on regularly for trial on the 25th day of August, 1944 before the Honorable Louis E. Goodman, Judge of the United States District Court. The plaintiff was represented by W. H. Brunner, Esq. and defendants by

Edmond F. Maher, Esq. Evidence both oral and documentary was offered on behalf of both parties, and the matter having been submitted to the Court and the Court having filed herein its findings of fact and conclusions of law, it is hereby

Ordered, Adjudged and Decreed:

1. That plaintiff's application for an injunction be and the same is hereby denied without prejudice.

[24]

2. That this Court retain jurisdiction of this cause with leave to the plaintiff, on notice, to renew his application for injunctive relief upon a showing of any further violations on the part of defendants of Revised Maximum Price Regulations Nos. 169 and 239, both as amended, or any other maximum price regulation applying to the sale at wholesale of fabricated cuts of beer, veal, lamb or mutton.

3. That plaintiff have judgment on behalf of the United States against defendants in the sum of \$6,755.30.

4. That plaintiff have judgment for its costs of suit amounting to \$

Dated this 8th day of January, 1945.

LOUIS E. GOODMAN

Judge of the United States

District Court

[Endorsed]: Filed Jan. 8, 1945. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 16th day of January, 1945, that F. Uri & Co., and individual parties defendant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 8th day of January, 1945 in favor of the plaintiff, Chester Bowles, Administrator, Office of Price Administration.

EDMOND F. MAHER

Attorney for Defendant.

Receipt of a copy of the within Notice of Appeal is hereby admitted this day of January, 1945.

GEORGE A. FARRADAY

W. H. BRUNNER

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 18, 1945. [26]

[Title of District Court and Cause.]

ORDER ALLOWING USE OF ORIGINAL TRANSCRIPT

Upon application of the Appellants, defendants herein, and the same being to the satisfaction of the Court, it is, by the Court this 2nd day of February, 1945:

Ordered: That the original transcript of testimony stenographically reported in said action be

transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, as part of the record on appeal in lieu of a copy.

LOUIS E. GOODMAN

Judge of the United States
District Court

Dated: February 2, 1945.

[Endorsed]: Filed Feb. 2, 1945. [27]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 30 pages, numbered from 1 to 30, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Chester Bowles, Administrator, Office of Price Administration, vs. F. Uri & Co., a corporation, Defendant, No. 23180-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.85 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of March, A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [31]

[Endorsed]: No. 11027. United States Circuit Court of Appeals for the Ninth Circuit. *F. Uri & Co., Inc.*, a corporation, Appellant, vs. *Chester Bowles*, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 4, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11027

F. URI & CO., a copartnership,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

STATEMENT OF POINTS

Appellant intends to rely on Appeal on the following points:

That under Section 2(h) of the Emergency Price Control Act, the Administrator may not compel changes in the business practices established in any industry except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under the Act.

That under date of December 10, 1942, the Administrator issued Revised Maximum Price Regulation 169 and the definition of a "Hotel Supply House" therein contained did subsequently result in changes in the business practices of the meat industry.

That thereafter on the 26th Day of April, 1943, the Administrator issued Amendment No. 12 to Revised Maximum Price Regulation No. 169, and therein re-defined the term "Hotel Supply House"

for the purpose of restoring normal business practices within the meat industry.

That the purpose of this new definition of a Hotel Supply House was solely to restore and not to change normal business practices.

That Appellant qualified as a Hotel Supply House under the definition incorporated in Amendment 12 to Revised Maximum Price Regulation No. 169, and that having thus qualified, he was entitled to charge the prices established by Said Amendment for Hotel Supply Houses.

That when, as set forth in Paragraph 3(a) of the Pre-Trial Order, the Appellee stipulated that Appellant had qualified as a Hotel Supply House, Appellee thereby stipulated that Appellant maintained a separate selling unit not physically attached to a slaughtering plant, branch house, or wholesaler or other establishment through which at least seventy per cent (70%) of the total weighed volume of meat, distributed in the base period, was sold or delivered to purveyors of meals.

That if during the base period Appellant could have maintained a separate selling establishment through which at least seventy per cent (70%) of its meats were sold to purveyors of meals and the balance to other buyers, Appellant's status as a separate selling establishment was not lost when after qualifying as a Hotel Supply House it continued to sell more than seventy (70%) per cent of its meats to purveyors of meals, and the balance to other buyers.

That in his memorandum decision on Pre-Trial

order, the District Court Judge erred in finding that to maintain the status of a Hotel Supply House, Appellant must maintain a separate selling establishment devoted to sales to purveyors of meals and to the exclusion of any other selling activity.

That the District Court Judge erred in finding that Appellant had so lost said status and that the said Court erred in giving judgment to Appellee in the sum of Six Thousand Seven Hundred and Fifty Five Dollars and Thirty Cents, (\$6,755.30).

EDMOND F. MAHER

Attorney for Appellant

Service of copy of this designation acknowledged this 10th day of April, 1945.

W. A. BRUNNER

JOSEPH E. TINNEY

Attorneys for Appellee

[Endorsed]: Filed April 10, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

The Appellant, F. Uri & Co., and the individual appellants in the above entitled cause, designate the following to constitute the record to be printed on appeal:

1. Complaint
2. Answer of Defendant
3. Stipulation as to facts
4. Memorandum of Opinion on Pre-Trial

5. Pre-Trial Order
6. Findings of Fact
7. Conclusions of Law
8. Judgment
9. Notice of Appeal by Defendants
10. Order allowing use of original transcript of testimony.
11. This designation.

EDMOND F. MAHER

Attorney for Appellant

Service of copy of this designation acknowledged
this 10th day of April, 1945.

W. H. BRUNNER

JOSEPH E. TINNEY

Attorneys for Appellee.

[Endorsed]: Filed April 10, 1945. Paul P.
O'Brien, Clerk.

No. 11,027

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. URI & Co., INC. (a copartnership);
GEORGE URI and MRS. BELL HOUSTON,
copartners,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

EDMOND F. MAHER,

Chancery Building, San Francisco 4, California,

Attorney for Appellants.

FILED

JUN 17 1945

PAUL P. O'BRIEN,

CLERK

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2-020 - G. v. Bowles, Emergency, Ct. of App.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

F. URI & Co., INC. (a copartnership);
GEORGE URI and MRS. BELL HOUSTON,
copartners,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

The Price Administrator instituted this suit in the District Court pursuant to Section 205(a) of the Emergency Price Control Act of 1942 (R-2), hereinafter referred to as "the Act", and jurisdiction of the District Court was properly exercised under Section 205(c) of the Act. (Pub. L. 421, 77th Cong., 2nd sess., c. 26, 56 Stat. 23, 50 U.S.C. Apx. 901, et seq. as

amended by the Stabilization Extension Act of 1944, Pub. L. 383, 78th Cong., 2nd sess.)

The judgment of the District Court was entered January 8, 1945. (R-25.) Notice of appeal was filed January 18, 1945. (R-26.) This Court has jurisdiction of the appeal by virtue of Section 129 of the Judicial Code. (28 U.S.C., Sec. 227, 36 Stat. 1134.)

II.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED ON APPEAL.

A. Statement of the case.

On May 26, 1943, the Administrator issued Amendment 12 to Revised Maximum Price Regulation No. 169 and therein defined the term "hotel supply house", and provided a premium which might be charged by such establishments for fabricated meats sold to purveyors of meals.

Appellants qualified as a hotel supply house under said amendment and thereafter charged such authorized prices for such sales.

Several months later, October 20, 1943, the Administrator issued an interpretation to the effect that hotel supply houses lost their status as such if they sold any meats to persons other than purveyors of meals. (Apx. O.) Appellants had sold a minor part of their meats to non-purveyors of meals during the base period, and had continued to sell a minor part of their meats to such buyers during the period of

August 1, 1943 to February 1, 1944, and on February 29, 1944, appellee filed a complaint against appellants in the lower Court. Answer having been duly filed, the question as to whether a hotel supply house must sell exclusively to purveyors of meals in order to retain its status was submitted to the Court below at a pretrial conference, and that question was decided affirmatively by the lower Court as set forth in the memorandum decision on pretrial order (R-11), and judgment was rendered on behalf of appellee for the sum of \$6755.30. (R-24.) Evidence submitted at the regular trial was restricted to matters concerning the good faith of the appellants.

B. Questions involved on appeal.

The only question involved on this appeal is whether or not the District Court erred in construing the definition of the term "hotel supply house" as it appears in Amendment 12 to RMPR 169 (Apx. H), as requiring a hotel supply house to maintain a separate selling establishment devoted to the business of selling meats exclusively to purveyors of meals.

This question does not involve the validity of the regulation and calls only for a determination of the real meaning of the regulation in order to determine whether or not appellants have infringed same.

III.

SPECIFICATIONS OF ERROR.

Appellants specify the following errors which they intend to urge and upon which they rely in the prosecution of this appeal:

1. That in his memorandum decision on pretrial order, the District Court Judge erred in finding that to maintain the status of a hotel supply house, appellants must maintain a separate selling establishment devoted to sales to purveyors of meals to the exclusion of any other selling activity.

2. That the District Court Judge erred in finding that appellants had so lost said status and that the said Court erred in giving judgment to appellee in the sum of six thousand seven hundred and fifty-five dollars and thirty cents (\$6755.30).

IV.**SUMMARY OF ARGUMENT.**

Appellants qualified as a hotel supply house under the definition set forth in Amendment 12 to RMPR-169 by virtue of having maintained a separate selling establishment in which meats were fabricated and through which during the base period, September 15-December 15, 1942, 70 per cent of all of their meats were sold to purveyors of meals. Having so qualified, appellants were entitled to charge hotel supply house prices as long as their selling establishment remained physically unattached to the selling establishment of

any other type of seller, and as long as sales to purveyors of meals remained the "chief" function of their selling establishment.

During the period herein at issue, appellants, from the same single establishment, continued to fabricate meats and sell more than 70 per cent of their meats to purveyors of meals. Sales of 30 per cent or less of their meats to other types of buyers did not serve to destroy the separate character of their establishment after Amendment 12 was issued any more than such sales served to destroy that separate character when made during the base period.

It was the expressed intention of the Administrator to "safeguard normal channels of distribution", and re-establish "according to customary trade practices, differentials * * *" between different types of sellers. It was not his intention to change such practices or destroy such differentials. Companies which had historically received hotel supply house prices were to continue to receive them. Companies which had traditionally sold for less money were to continue to receive less money.

To construe Amendment 12 as requiring that sales to purveyors of meals should thereafter be the "exclusive" rather than the "chief" function of a hotel supply house is to say that the Administrator intended to change rather than to re-establish and safeguard customary business practices. Such a construction does violence to the established rules of legal and grammatical construction and distorts the plain meaning of ordinary words and phrases, and is at odds

with the intentions expressed by the Administrator in his statement of considerations issued in support of said amendment.

V.

ARGUMENT.

A. HISTORICALLY, PACKERS, WHOLESALERS AND OTHERS WHO CONDUCTED DIVERSIFIED OPERATIONS RECEIVED LOWER PRICES THAN HOTEL SUPPLY HOUSES.

The statement of considerations, supporting Amendment 12 to RMPR-169, excerpts from which are set forth in Apx. E of this brief, sets out quite clearly the historical trade distinctions which existed within the meat industry.

Packers were the slaughterers of live cattle, who processed meat and its by-products, and sold fresh meat primarily to wholesalers and hotel supply houses.

Wholesalers purchased carcasses from the packer and sold sides and cuts of meat primarily to retailers.

Hotel supply companies were those firms whose chief function was that of fabricating meats and supplying meats to purveyors of meals. Such firms bought carcasses from packers and had to maintain a constant rather than an occasional supply of fabricated cuts, and had to make frequent small deliveries to their customers. Because of these and other specialized services, the separate hotel supply houses historically received higher prices than other types of distributor.

In some instances, a packer or wholesaler operated a hotel supply house as a separate business, not connected with his wholesale or packing plant. Such operation entailed a separate premises with separate overhead, and with its facilities and personnel devoted chiefly to fabricating meat cuts and selling meats to purveyors of meals. Where such a separate establishment rendered the same specialized services as the independently owned hotel supply house it was considered to be a hotel supply house and historically received hotel supply house prices. (Apx. E.)

However, as the Administrator points out (Apx. E, Art. I, Par. 4):

“Many packers selling direct to hotels and restaurants have offered a less specialized service than the hotel supply houses. Because of this limited service and the spreading of overhead through diversified operations, costs of hotel supply departments of packers and the average margins obtained by them have generally been less than those of separate hotel supply companies.”

The distinction is clear. The packer or wholesaler who supplied purveyors of meals as a sideline to his packing or wholesaling business could and traditionally did sell for comparatively low prices. The hotel supply house, whether independently or packer or wholesaler owned, had to look to its hotel supply business to support a separate establishment and had to render specialized services which had historically necessitated a higher schedule of prices for the same fabricated cuts of meat.

It was to protect the historic differentials existing between these two types of sellers that Amendment 12 was promulgated. As the Administrator stated in his statement of considerations (Apx. E):

“Allowing a higher percentage of mark-up for the maximum prices for fabricated cuts sold by hotel supply houses than for those sold by slaughterers and packers’ branch houses, tends to maintain the relationship that existed in the past between prices obtained by the two types of sellers and preserve their competitive positions. It recognizes that the packer has obtained part of his profit in the price of the primal cut and that the diversified operations of the packer help to carry his overhead. In addition, the services rendered by packers to purveyors of meals have usually been less complete, thus making their costs in supplying this trade somewhat lower than the costs of the unaffiliated hotel supply companies.”

B. THE ADMINISTRATOR’S PREVIOUS ATTEMPT TO RECOGNIZE HISTORIC PRICE DIFFERENTIALS HAD RESULTED IN FAILURE.

If the Administrator was to obey the legal requirement that he must not needlessly disturb established business practices (Apx. A), it was necessary that his regulations recognize the price differentials existing within the meat industry. His first attempt to accord this recognition was made on December 10, 1942, when he issued Revised Maximum Price Regulation 169 and therein for the first time defined “hotel supply

house'', and provided for an additional 20 per cent mark-up for hotel supply houses. (Apx. B-C.)

In defining ''hotel supply house'' in Revised Maximum Price Regulation 169, the Administrator failed to draw any distinction between those whose chief function had been supplying purveyors of meals, and those who had rendered such service merely as a minor part of their packing or wholesaling activities. Thus the Administrator made it possible for anyone who had an established practice of fabricating meat for sale to purveyors of meals to qualify as a hotel supply house and charge an additional 20 per cent, no matter how small a part of his operations such a practice might have been.

The result of this was to entirely disrupt normal trade practices and allow firms which had never received hotel supply house prices to charge such prices. All sellers sought to move as much meat as possible through hotel supply house operations. Hotel supply houses, not affiliated with packers, found difficulty in obtaining products from their usual sources of supply. (Apx. E, Art. II, Pars. 1 and 2.)

These and other results of RMPR-169 were directly opposite to those contemplated by the Administrator. Instead of re-establishing normal business practices, it destroyed them. Hotel supply houses were often unable to get meat; other sellers moved in and operated under hotel supply house prices; meat shortages in retail stores were magnified and retailers put under pressure to evade the regulation. (Apx. E, Par. 2.)

C. IN ORDER TO PREVENT ABUSES AND SAFEGUARD NORMAL TRADE PRACTICES, THE ADMINISTRATOR ISSUED AMENDMENT 12 TO RMPR-169.

In order to correct these abuses, and to safeguard normal channels of distribution, and reestablish customary trade practices (Apx. D, and Apx. F), the Administrator, five months later, issued Amendment 12 to RMPR-169 on May 26, 1943, and therein redefined the term "hotel supply house" (Apx. H), and set up separate schedules of prices for fabricated cuts sold to purveyors of meals, for: 1. "Hotel supply houses", and 2. "Packing or slaughtering plants, packing branch houses, wholesalers, or other selling establishment." (Apx. L and M.)

It was not with any idea of changing the methods of operation of the legitimate hotel supply house that Amendment 12 was issued. Nowhere in any release, statement of considerations, regulation or amendment is such a purpose even remotely suggested. On the contrary, every implication in every one of such documents is to the effect that the desire was to restore normal relationships between the various types of distributors. (Apx. D, Pars. 1 and 2.)

In order to achieve that purpose, the Administrator drew a line between those whose chief function had been that of fabricating meats and selling same (along with other meat products) to purveyors of meals, and those to whom such a function had historically been a minor part of their operations. This purpose was achieved when Amendment 12 redefined the term "hotel supply house" as follows:

“ ‘Hotel Supply House’ means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer’s branch house, wholesaler’s or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible by-products to purveyors of meals; and which during the period September 15 through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight volume of meat, variety meats, or edible by-products sold by it.”

In regard to that definition it will be noted first of all that it bars newcomers from the hotel supply business. One must have had a base period experience in order to qualify as a hotel supply house.

Again, that definition requires the base period existence of a “separate selling establishment,” the chief function of which was fabricating meat cuts and selling meats to purveyors of meals. A base period separate selling establishment was insufficient unless it could meet the 70 percent sales requirement. Neither could a packer or wholesaler have designated a corner of his shipping room as a hotel supply department and claim hotel supply house status because 70 percent of the sales made from that corner had been made to purveyors of meals. Separateness, which means independent and additional overhead, was also a prerequisite.

Even more clearly than in the definition, the need for a base period separate establishment and for base period sales of 70 percent or more, is set forth in the

statement of considerations (Apx. E), which reads in part as follows:

“To qualify as a hotel supply house a packing or slaughtering plant, packer’s branch house or wholesaler’s, or other type of establishment *must have maintained a separate selling unit not physically attached* to the slaughtering plant, branch house, or wholesaler’s, or other establishment *through which* at least 70 percent of the total weight volume of meat *distributed in the base period was sold or delivered* to purveyors of meals.” (Italics added.)

The necessity for a base period experience entailing a separate establishment and 70 percent sales may also be adduced by a simple grammatical analysis of the definitive sentence. Each time the pronoun “which” appears in the definition it refers back to the term “separate selling establishment”. It can refer to nothing else. This is more obvious when the sentence is contracted to read as follows:

“Hotel supply house means a separate selling establishment * * *; which during the base period September 15 through December 15, 1942, sold to purveyors of meals * * * 70 percent of the total weight volume of meat, variety meats, or edible by-products sold by it.”

There is not a word in that definition which even intimates that hotel supply houses must make 100 percent sales to purveyors of meals. The absence of such restrictive words as “only” or “exclusively” is conspicuous in the light of the present litigation. Base period sales of 70 percent to purveyors of meals and

30 percent to other buyers did not then destroy the "separate" character of the hotel supply house premises. It is difficult to understand how subsequent sales of 30 percent or less to other buyers can now be construed as destroying the "separate" character of an establishment which had to be "separate" during the base period when it was selling 30 percent or less of its meats to other buyers.

The word "separate" in "separate selling establishment" is explained by the words which follow: namely, "which is not physically attached to a packing or slaughtering plant, etc." The separateness required is not to be achieved by dedicating one establishment to the performance of a single function, but by maintaining physical separation between two selling premises of different types.

During the base period a packer might have maintained two affiliated, but physically separate, selling establishments. He could have performed two functions in each establishment. He could have used the first for slaughtering and packing and the second for wholesaling and supplying hotels and restaurants. The fact that each was performing more than a single function would not destroy their separate character nor cause them to become physically attached to each other. However, the owner could qualify the second separate selling establishment as a hotel supply house only if during the base period 70 percent of the meats sold through that second establishment had been sold to purveyors of meals.

Appellants, having qualified as a hotel supply house, could lose that status only in one of three ways. They could go out of business. They could become attached, physically, to another selling establishment, the chief function of which would be selling meats to persons other than purveyors of meals. They could change their operations so that the function of the same selling establishment through which they qualified was no longer that of selling chiefly to purveyors of meals.

Appellants' qualification as a hotel supply house has been stipulated. It has not been alleged that they have either gone out of business, nor that their establishment has become physically connected with another selling establishment performing a different function. Neither has it been alleged that appellants discontinued the practice of making sales to purveyors of meals the chief function of their single selling establishment.

On the contrary, it has been stipulated that appellants qualified as a hotel supply house by reason of having sold 70 percent of their meats during the base period to purveyors of meals (Pre-Trial Order, R-16, Par. 3(c)), from a "single selling establishment" (Findings of Fact, Par. 3(b), R-20), and that they continued to sell more than 70 percent of their meats to purveyors of meals from that same establishment, during the period covered by this litigation. (Findings of Fact, Par. 3(c), R-20.)

Had appellants changed the nature of their business so that wholesaling to retailers became the chief func-

tion, it would be conceded that they might have lost their status as a hotel supply house. Had appellants set up a packing or wholesaling business adjacent to and physically connected with their established selling premises, loss of status would be conceded. Such an action would have enabled them to spread their overhead over diversified operations, and they could have looked for part of their profit to such added activities.

The action of appellants in selling a small part of their meats to persons other than purveyors of meals achieved no such purpose. The lower Court found as a fact that all sales of primal cuts made by defendants to butchers were made at defendants' costs without any mark-up or profit whatsoever. That all sales of scraps, bones, and fats were made at the proper ceiling prices therefor. (Findings of Fact, Par. 3(h), R-22-23.) Such ceilings provided no premiums.

The judgment of the Court below was not based upon any action of appellants in establishing physical contact between their premises and another selling premises; nor upon any action by appellants in substituting some function other than that of supplying purveyors of meals as the chief function of their own selling establishment. The decision of the lower Court is based upon a single sale to P. Micheletti and Co. on August 6, 1943, which company was not a purveyor of meals.

The Court held as a matter of law that as a result of said sale, appellants lost their status as a hotel supply house. (Findings of Fact and Conclusions of Law, Par. 3(e), R-21.)

It is submitted that such a sale to P. Micheletti and Co. did not serve to destroy the "separate" character of appellants' selling establishment when made on August 3, 1943, than such a sale did destroy or would have destroyed such "separate" character if or when made during the base period. If such is the case then one base period sale to a buyer other than a purveyor of meals would have destroyed the separate character of appellants' selling establishment during the base period, and they could not have qualified as a hotel supply house.

D. THE EFFECT OF THE DECISION OF THE LOWER COURT IS TO DESTROY RATHER THAN TO PRESERVE ESTABLISHED BUSINESS PRACTICES.

In his memorandum decision on pre-trial order (R-14) the District Court stated:

"Designating a 'hotel supply house' in the regulation as 'a separate selling establishment' would seem to have no other reasonable purpose than that of exclusion of any other selling activity."

It was upon that sentence that the judgment of the lower Court was based.

In reaching the conclusion that the term "separate selling establishment" precludes any other selling activity, the Court below adopted a construction which was not intended by the Administrator when he issued Amendment 12, and which is clearly at variance with those intentions as set forth in the statement of considerations supporting Amendment 12, and with the provisions of the Amendment itself.

The Administrator in his statement of considerations (Apx. E, Art. I, Par. 1), states that:

“There *are* approximately 600 business establishments in the United States, whose *chief function is* that of preparing and fabricating meat cuts and selling them (along with other meat products) to hotels, restaurants and other purveyors of meals. These establishments *are* generally known as hotel supply houses.” (Italics added.)

Sales of meat to purveyors of meals not only “was” but “is” the “chief” and not the “exclusive” function of the hotel supply house.

The Administrator also stated in Article III of said Statement, above quoted, that allowing a premium to hotel supply houses tends to maintain the relationship which existed in the past between the two types of sellers and preserve their competitive positions.

The interpretation of the lower Court would not serve to maintain the relationships which had previously existed. It would destroy them.

Aside from the need to sell surplus cuts to retailers, it is manifestly impossible for a hotel supply house to sell to purveyors of meals, to the exclusion of any other selling activity. Bones, fat, scraps and waste are the by-products of fabrication, and have to be sold not only to restaurants but to tallow renderers and others. These products are under ceilings, and Amendment 12 requires that the same records be kept of sales of such products whether edible or inedible as are kept of sales of the better cuts of meat. (Apx. G.) Such items are considered meats and meat ration

points had to be collected for them. (Apx. M.) Failure to keep such records or collect such points would have been just as much a violation of the law as to sell at above-ceiling prices.

In addition to and immediately preceding the sentence above quoted from the memorandum decision on pre-trial order (R-14), the Court further stated:

“The ‘statement of considerations’ issued by the Administrator pursuant to Section 2-A of the Act, indicates some of the factors underlying and justifying such purpose and intent. Meat purveyors, a substantial amount of whose sales during the base period, were to purveyors of meals, are granted by the regulation the status of a ‘hotel supply house’ if they maintain a separate selling establishment devoted to that business. There appear to be adequate administrative bases for that requirement. Difficulty of enforcement to attain the objectives of the law alone appear to be a sufficient reason.”

Had the Administrator intended to change the “chief function” of a hotel supply house so that that function would thereafter be its “exclusive” function, Section 2-A of the Act does make it incumbent upon the Administrator to state the considerations necessitating such a change.

Nowhere in the statement of considerations referred to by the Court below does there appear any intimation that such a change is contemplated. Nowhere in that statement is any consideration stated to the effect that such a change is necessary, nor is there a single consideration stated to show why such a change is

necessary. Nowhere in said statement is there a single word to the effect that enforcement difficulties require that a separate selling establishment which sold 70 per cent of its meats to purveyors of meals during the base period must thereafter sell 100 per cent to such buyers.

The statement of considerations does set out at length the real reasons why the Amendment was issued; to maintain relationships that existed in the past and to correct the abuses which arose during the five months preceding the promulgation of the Amendment. If it was contemplated that established business practices be changed, the Administrator would have stated that such a change was to be imposed and he would have stated the considerations necessitating such a change. 'Section 2-A of the Emergency Price Control Act, cited by the Court, required him to make such a statement. That he stated no such considerations is proof that no such change was contemplated.

When the Court below uses the words "if they maintain" a separate selling establishment, it is evident that said Court regards the maintenance of such separate selling establishment as a new requirement becoming effective concurrently with the issuance of Amendment 12, whereas it is obvious that a packer who sold 70 per cent of his meats to purveyors of meals during the base period could not qualify the establishment through which he made such sales as a hotel supply house if, during that base period, that establishment had been physically connected with his packing plant.

Such a separate selling establishment had to be maintained during the base period. It was not a currently new requirement. The establishment which was "separate" during the base period when it was selling less than 100 per cent of its meats to purveyors of meals did not automatically become physically attached to another selling establishment when it continued to do exactly the same thing after Amendment 12 was issued.

E. NOT ONLY DID THE ADMINISTRATOR INTEND THAT HOTEL SUPPLY HOUSES MIGHT SELL TO OTHER BUYERS, BUT HE SPECIFICALLY PROVIDED FOR SUCH SALES.

The Administrator not only refrained from intimating that in the future hotel supply houses would have to make sales to purveyors of meals their exclusive function, but he specifically provided for sales to other buyers.

On page 2 of Amendment 12, and facing the paragraph in which "hotel supply house" is defined, the Administrator provided in Section 1364.407(e) (Apx. G), that:

*"Every separate selling establishment making sales to purveyors of meals * * * shall keep for inspection by the Office of Price Administration * * * a complete and accurate record * * * showing separately the sales in pounds of each grade of each item made to purveyors of meals, war procurement agencies and other government agencies, and the sales in pounds made to other buyers."* (Italics added.)

Section 1364.454(5) of RMPR-169 (Apx. J), which was in effect during the whole period covered by this litigation, provides in part:

“For local delivery made from the place of business of a wholesaler or *hotel supply house* * * * to the place of business of a *seller at retail*, purveyor of meals or *commercial user* * * * located more than 25 miles from such shipping point; the seller may add the cost of local delivery * * *.” (Italics added.)

Section 1364.172(b), MPR-239 (Apx. I), shows that what was actually prohibited was sales to other buyers at prices authorized only for sales to purveyors of meals. This provision was also in effect during the entire period covered by this action.

The statement of considerations for Amendment 1 of MPR-398 (Apx. K), definitely infers that hotel supply houses may sell to retailers but not at the \$2.00 mark-up provided for sales to purveyors of meals.

F. THE ONLY POINT AT ISSUE INVOLVES THE MEANING OF THE DEFINITION OF HOTEL SUPPLY HOUSE.

In his memorandum decision on pre-trial order (R-13), the Court states in part as follows:

“It is conceded that if the regulation means what the Administrator claims, the defendant has infringed same. With the validity of the regulation, this Court has no concern. (Section 204-d of the Act.) The Court is here called upon to determine the meaning of the regulation only for the pur-

pose of deciding whether defendant has infringed as charged in the complaint.”

The “meaning of the regulation” was the only question at issue in the lower Court, and is the only question at issue on appeal. Nowhere in the Record does it appear that the Court was asked to give or did give any particular weight to the Administrator’s interpretation to the effect that a hotel supply house is confined by the amendment to sales exclusively to purveyors of meals. Rather the Record shows that the Court was called upon to reach and did reach his own conclusion as to the meaning of the definition of a hotel supply house as it appears in the amendment.

It is respectfully submitted that the meaning of words and phrases as they appear in any law or regulation is to be determined by the intentions expressed by the legislators or the executive at the time that law or regulation is adopted, and not on the basis of some conflicting statement made months after such law or regulation becomes effective.

If the Administrator had desired to prohibit sales by hotel supply houses to retailers, he had only to issue a statement of considerations and promulgate a regulation into which he had written such a provision. That regulation would then have been law, and appellants would have been charged with notice thereof. He can not escape the legal requirements of issuing a statement of considerations and of writing a new amendment, by stating that an existing regulation means something that it does not mean, and which he obviously did not intend it to mean when he wrote it.

Amendment 12 was issued for a single purpose, and that was to correct the abuses which followed issuance of RMPR-169 five months earlier, by giving a premium to those dealers who had been "predominantly" engaged in the business of supplying purveyors of meals during the base period. If a dealer had been so predominantly engaged, he was entitled to the premium; otherwise he was not so entitled. Appellants had been so engaged and were entitled to the premium which execution of the judgment of the District Court would in effect take away from them.

That such was the purpose of Amendment 12, was restated by the Administrator more than a year after issuance of the Amendment; nine months after he had issued the conflicting interpretation with which appellants take issue herein; and five months after complaint against appellants was filed in the lower Court.

On July 6, 1944, in dismissing an amended protest filed by Oswald and Hess Company, Pittsburgh, Pennsylvania, the Administrator stated:

"On the other hand the Administrator recognized that preservation of the historical price premium enjoyed by the particular class of sellers known as hotel supply houses involved considerable difficulties, it was obviously necessary to prevent sellers from taking undue advantage of that premium and diverting supplies needed in a short market from the customary channels of distribution to the hotel and restaurant trade. *Therefore eligibility for the premium was restricted to those who during a specified base period predominantly engaged in that trade* and in addition a limitation

of the amount of fabricated meat cuts which may be sold to purveyors of meals was established in the form of a quota determined by the amount of such sales made during such base period." (Italics added.)

* * * * *

United States Emergency Court of Appeals,
No. 49, March 29, 1945. (Commerce Clearing
House, War Law Service, Price Control
Cases, Section 52,177.)

VI.

CONCLUSION.

It is respectfully submitted that appellants, having qualified as a hotel supply house by maintaining a separate selling establishment in which they fabricated meat cuts and through which during the base period they sold at least 70 per cent of their meats to purveyors of meals and the balance to other buyers, did not lose their status as a hotel supply house when they continued to make sales to purveyors of meals the chief function of the same establishment after promulgation of Amendment 12; and that appellants were entitled to charge the prices for sales of fabricated cuts to purveyors of meals which are authorized by said amendment for sales by hotel supply houses (Apx. L), and were not restricted to the prices authorized for sales of such cuts to such purveyors by packers, packer's branch houses, wholesalers or other types of distributors. (Apx. M.)

It is respectfully submitted that the judgment of the lower Court awarding appellee the sum of \$6755.30 should be reversed.

Dated, San Francisco, California,
June 15, 1945.

Respectfully submitted,
EDMOND F. MAHER,
Attorney for Appellants.

Appendices A to O Follow.)



Appendices.

Appendix A

Section 2(h) of the Emergency Price Control Act of 1942

(Pub. L. 421, 77th Cong., 2nd Sess., c. 26,
56 Stat. 23, 50 U. S. C. Appendix 901, et seq.)

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

Appendix B

Excerpt from
Rev. MPR-169 as issued
December 10, 1942

Section 1364.455(13) "Hotel Supply House" means a seller of beef, veal or processed products who as an established practice handles beef and/or veal for the purpose of boning, trimming and cutting or otherwise fabricating such beef and/or veal for resale to hotels, restaurants or other purveyors of meals.

Appendix C

Excerpt from
Press Release Attached to
Rev. MPR-169 as issued
December 10, 1942

(4) Hotel and restaurant supply houses—performing certain services for purveyors of meals lacking facilities—will have the same prices as other independent wholesalers so far as most wholesale beef cuts are concerned. However, on the sale of fabricated cuts—specifically cutting up primal cuts into roasts, steaks, stews, etc. by boning or sawing through the bones of the wholesale cuts so as to prepare the meat for cooking without further fabrication—hotel supply houses may have a 20 per cent mark-up over the zone price where such fabricating is done. This 20 per cent also will apply to wholesale cuts from which at least 25 per cent of the bone has been removed. However each such hotel supplier must file his ceiling price with OPA for each fabricated cut, describing the cut and showing cutting yields obtained.

Appendix D

Excerpts from
Page 1 of
Rev. MPR-169, Amendment No. 12
Dated May 26, 1943

Advance Release: OPA-2559
for Thursday Morning Papers,
May 27, 1943

* * * * *

Besides lowering prices for these cuts, OPA has taken steps to *safeguard normal channels of distribution* by setting limits on the proportion of beef and veal that may be diverted by each seller to the hotel and restaurant trade in the form of fabricated cuts. No hotel supply house, slaughterer, packer's branch house or wholesaler will be permitted, during specified three-month periods to sell to purveyors of meals more meat in the form of fabricated cuts than 70 per cent of the volume of all meat and meat products sold by it to such buyers in the period from September 15, 1942, to December 15, 1942. However, sales to war procurement agencies are excluded from the 70 per cent restriction.

The amendment establishes, *according to customary trade practice*, differentials between specific ceilings on fabricated cuts allowed hotel supply houses and those allowed slaughterers, packer's branch houses and wholesalers. By making prices for such cuts less attractive to the latter class of sellers than they have been recently, the new ceilings are expected to work hand in hand with the 70 per cent restriction in diverting meats to retail stores.

The moves are part of another step toward establishing specific prices for all meats at the wholesale level. Specific prices that hotel supply houses may charge for fabricated cuts when sold to "purveyors of meals," were established for lamb and mutton last December. Ceiling prices for fabricated cuts of beef and veal, when sold by hotel supply houses and similar distributors, had been set first under a freeze date. Since December 17, 1942, ceiling prices for these cuts of beef, when sold by hotel supply houses and such sellers as packer's branch houses to restaurants and other purveyors of meals, have been based on a formula which allowed a mark-up of 20 per cent over the ceiling price of the primal cuts from which the fabricated cuts were made.

* * * * * * *

The two classes of sellers for whom the prices for fabricated cuts are established are described more fully as follows:

(1) Hotel Supply Houses, which are permitted to use the prices provided for such sellers, are separate selling establishments not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's, or other selling establishment, which are engaged in the fabrication and sale of meat cuts, variety meats, and edible by-products to purveyors of meals, and which, during the period September 15, 1942, through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 per cent of the total weight volume of meat, variety meats, or edible by-products sold by it.

(2) Packing or slaughtering plants, packing branch houses, or wholesalers or other types of distributive establishments which may use the specific prices for fabricated cuts sold to purveyors of meals that are provided for this group, are those which sold fabricated cuts of beef or veal in any volume to purveyors of meals in the base period of September 15 to December 15, 1942. They may not, however, sell fabricated cuts of all kinds in quantities more than 70 per cent by weight of their total sales of all meat and meat products in that base period.

The lists of standardized fabricated cuts and their definitions were worked out in consultation with representative members of the hotel supply industry, including both hotel supply companies and the hotel supply departments of packing companies.

Cutting tests were conducted for both beef and veal fabricated cuts and the results of the tests were checked against each other, and against information in order to determine yield data to be used.

For each fabricated beef cut, for example, the yield for the fabricated cut, expressed as a percentage of the primal cut, was computed by taking an approximate average of figures from cutting tests conducted in San Francisco, Kansas City, St. Louis, Chicago, Washington, D. C., New York and Boston. The tests were made by reputable hotel supply houses which were instructed by the OPA in the method of cutting and the extent of fabrication for each cut. Representatives of the OPA attended some of the tests. (*Italics added.*)

Appendix E

Excerpts From Document No. 16,205

Office of Price Administration
Statement of Considerations Involved in the
Issuance of Amendment No. 12 to
Revised Maximum Price Regulation No. 169
Beef and Veal Carcasses and Wholesale Cuts
Dated May 26, 1943.

* * * * *

I. The nature of the industry.

There are approximately 600 business establishments in the United States whose *chief function is* that of preparing and fabricating meat cuts and selling them (along with other meat products) to hotels, restaurants, and other purveyors of meals. These establishments *are* generally known as hotel supply houses. Some meat packing companies also perform this function as a minor part of their operations, either directly at their plants or branch houses or through subsidiary companies.

According to the Census of Business' Retail Sales statistics for 1939, the combined sales of restaurants, cafeterias, lunch rooms, lunch counters, and stands in the United States totaled over two billion dollars. Members of the hotel supply industry estimate that, allowing for the increase in prices, approximately a billion dollars' worth of meat and meat products were sold to restaurants, hotels, and other purveyors of

meals in 1942. About 75 per cent of the total sales consisted of beef and veal. Hotel supply houses account for approximately 70 per cent of the total volume of sales of meats to purveyors of meals.

Functions performed by hotel supply houses and the hotel supply departments of packing companies include providing special selections, aging and trimming of primal cuts which may be sold as such or fabricated into steaks, roasts, stews and ground meat to fulfill the varying specifications of different types of purveyors of meals. Frequent and sometimes small deliveries are required. Because of these special services, costs are considerably higher than are involved in the wholesale distribution of meat to retailers. Hence, special pricing provisions are necessary to make possible continuation of the services the hotel supply units render.

Historically, the large packers appear to have recognized the hotel supply houses as the principal supplier of the hotel and restaurant trade, and have been an important source of supply for the majority of hotel supply houses. Many packers selling direct to hotels and restaurants have offered a less specialized service than the hotel supply houses. Because of this limited service and the spreading of overhead through diversified operations, costs of hotel supply departments of packers and the average margins obtained by them have generally been less than those of separate hotel supply companies.

II. History of price action and need for specific ceiling prices.

* * * * *

Immediately after Revised Maximum Price Regulation No. 169 was issued, many packers either began or greatly increased operations in the hotel supply branch of the meat industry. Numerous reports were received by the Office of Price Administration that hotels and restaurants had abundant supplies of beef while great scarcity prevailed in retail stores. Hotel supply houses not affiliated with packing companies experienced difficulty in obtaining products from their usual sources of supply.

It was apparent that the mark-up of 20 per cent allowed made sales of fabricated cuts to hotels and restaurants more attractive than sales through other outlets, even after allowing for the additional costs of hotel supply house operations. Sellers sought to move the maximum quantity through hotel supply channels, this magnifying the shortage in retail stores and putting retailers under pressure to evade the regulation by buying from hotel supply departments in order to obtain product. Because of the shortage and the fact that they possessed the meat, slaughterers were in a strategic position to take over a large proportion of the hotel supply business. Furthermore, the fact that some of the specialized services formerly offered by hotel supply houses were no longer necessary to obtain order from hotels and restaurants, because of the shortage of meat, favored expansion by packers in the field. The higher realizations obtained from the sales of fabricated cuts under the mark-up

permitted contributed to the strength in prices for live cattle which placed under hardship those establishments not selling to purveyors of meals.

In order to establish fair prices for all sellers to hotels and restaurants, it was deemed advisable to take the following steps:

- (1) List and precisely define a limited number of standard fabricated beef and veal cuts.
- (2) Determine fair percentages of mark-up over the prices of wholesale cuts to cover costs of fabrication, operating expenses and a fair net margin for—
 - (a) Hotel supply houses.
 - (b) Packers, packers' branch houses, wholesalers or other type of distributor.

*

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The amendment requires that hotel supply houses, packers' branch houses, and wholesalers certify their total sales by weight, of all meat products in the period September 15, 1942, to December 15, 1942, inclusive, and their sales of meats to purveyors of meals in the same period. Each seller is prohibited from selling in the form of fabricated cuts in any quarterly period ending August 31, November 30, February 28, and May 31 more than 70 per cent of the total weight volume of all meats that he sold to purveyors of meals in the three months ended December 15, 1942. In making these determinations, sales to war procurement agencies are to be excluded.

Hotel supply houses are defined as establishments which, in the three months ended December 15, 1942, sold or delivered to purveyors of meals at least 70 per cent of the total weight volume of all meats sold through such establishment. To qualify as a hotel supply house, a packing or slaughtering plant, packer's branch house or wholesaler's, or other type of establishment, *must have maintained a separate selling unit* not physically attached to the slaughtering plant, branch house, or wholesaler's, or other establishment, *through which* at least 70 per cent of the total weight volume of meat *distributed in the base period* was sold or delivered to purveyors of meals. Sales to war procurement agencies are to be excluded in making the calculations.

Allowing a higher percentage of mark-up for the maximum prices for fabricated cuts sold by hotel supply houses than for those sold by slaughterers and packers' branch houses, *tends to maintain the relationship* that existed in the past between prices obtained by the two types of sellers and *preserve their competitive positions*. It recognizes that the packer has obtained part of his profit in the price of the primal cut and that the diversified operations of the packer help to carry his overhead. In addition, the services rendered by packers to purveyors of meals have usually been less complete, thus making their costs in supplying this trade somewhat lower than the costs of the unaffiliated hotel supply companies.

* * * * *

IV. Effects of this amendment on the price level of fabricated beef cuts sold to purveyors of meals.

The maximum prices in this amendment are generally lower than the average of the ceiling prices for beef submitted under Revised Maximum Price Regulation No. 169. The mark-up used in calculating the specific ceiling prices for hotel supply houses was somewhat less than the 20 per cent mark-up previously permitted in Revised Maximum Price Regulation No. 169. That mark-up evidently afforded a wider margin of profit to distributors than did other types of sales outlets, as evidenced by the fact that many packers and slaughterers either began or increased operations in the hotel supply business after the regulation was issued. (*Italics added.*)

Appendix F

Excerpts From
 OPA Statement of Considerations
 Involved in the Issuance of
 Maximum Price Regulation No. 398
 Dated May 22, 1943

Variety Meats and Edible By-Products at Wholesale.

* * * * *

Hotel supply houses are permitted to charge \$2.00 per hundred-weight more for products sold by them. Their establishments perform special services for purveyors of meals who require treatment different from that given the ordinary retailer. To perform these services, sellers catering to this trade need a much higher operating margin than do ordinary sellers.

This addition is limited, however, to hotel supply houses who can show that during March, 1942, 50 per cent of their business was done with purveyors of meals and who maintain establishments separate from that of a slaughterer.

The reasons for these limitations are several. The premiums allowed hotel supply houses in the other regulations have been abused. These additions established to compensate for a special way of doing business have been claimed by people who formerly had no interest in the trade. The slaughterers have sought to keep these additions themselves and have refused

meat to the established hotel supply houses selling to their trade, instead, at the higher prices. To prevent this and to restrict the premium to those houses whose expenses justify this addition the limitations set forth above were imposed.

Appendix G

Excerpt from
Rev. MPR-169, Amendment 12
Dated May 26, 1943

* * * * * *

1. Section 1364.407(e) is amended to read as follows:

(e) (1) *Every separate selling establishment* making sales to purveyors of meals, war procurement agencies, or other government agencies pursuant to the provisions of paragraph (o) of Section 1364.452 or paragraph (n) of Section 1364.467 shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, is in effect, a complete and accurate record in schedule form for each calendar month commencing with January, 1943, with respect to beef, and June 1, 1943 with respect to veal showing separately: (i) the total inventory in pounds at the beginning of each month of each grade of each beef carcass, beef wholesale cut, fabricated beef cut, beef offal item and beef by-product (bones, fat, tallow, waste, etc.); veal carcass, veal wholesale cut, fabricated veal cut, veal offal item and veal by-product (bones, fat, tallow, waste, etc.); the total additions to inventory in pounds during the month for each grade of each such item; and the total inventory in pounds at the end of each month for each grade of each such item; (ii) the total sales in pounds during the month of each grade of beef carcass, beef wholesale cut, fabricated beef cut, beef offal item, and beef by-product (bones, fat, tallow, waste,

etc.); veal carcass, veal wholesale cut, fabricated veal cut, veal offal item, and veal by-product (bones, fat, tallow, waste, etc.), showing separately the sales in pounds of each grade of each item made to purveyors of meals, war procurement agencies and other government agencies *and the sales in pounds made to other buyers*; (iii) the total sales realization for each item separately enumerated in (ii) hereof (all sales of kosher meat shall be shown separately). (Italics added.)

Appendix H

Excerpt from
Revised MPR-169, Amendment 12
Dated May 26, 1943

* * * * * * *

7. Section 1364.455(b) is added to read as follows:

(b) When used in this Revised Maximum Price Regulation No. 169 and when applicable to sales of fabricated beef cuts to purveyors of meals the term:

(1) "Hotel Supply House" means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible by-products to purveyors of meals; and which during the period September 15 through December 15, 1942 sold to purveyors of meals, other than war procurement agencies, 70 per cent of the total weight volume of meat, variety meats, or edible by-products sold by it.

(2) "Purveyors of meals" means:

(i) any restaurant, hotel, cafe, cafeteria or establishment which purchases meats and where meals, food portions or refreshments are served for a consideration.

(ii) The Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any agency of the United States.

(iii) Any person operating an ocean going vessel engaged in the transportation of cargo or passengers in foreign, coastwise or intercoastal trade, to the extent that meat is delivered to him as ship's stores for consumption aboard such vessel.

(iv) Any hospital, asylum, orphanage, prison or other similar institution, which is operated by any federal, state, or local government or agency thereof.

Appendix I

Excerpt from Revised Maximum Price Regulation No. 239

Lamb and Mutton Carcasses and Wholesale Cuts.

* * * * *

Section 1364.172(b). Specifically, but not exclusively, the following practices are prohibited:

* * * * *

(5) Selling or invoicing lamb or mutton by hotel supply houses to persons other than purveyors of meals at the prices allowed on sales to purveyors of meals.

Appendix J

Excerpt from Revised Maximum Price Regulation No. 169

Beef and Veal Carcasses and Wholesale Cuts.

* * * * *

Section 1364.454, Schedule III: Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:

* * * * *

(5) * * * For local delivery made from the place of business of a wholesaler or *Hotel Supply House* located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a *seller at retail*, purveyor of meals or *commercial user*, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point: the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt. (*Italics added.*)

* * * * *

Appendix K

Excerpt from
Statement of Considerations
Involved in the Issuance
of Amendment No. 1 to
Maximum Price Regulation No. 398
issued August 6, 1943

* * * * *

The allowance given hotel supply houses is amended so as to limit the overcharge that may be charged to sales made to purveyors of meals. It was not intended that retailers be charged the \$2.00 per hundredweight addition.

* * * * *

Appendix L

Excerpt from Revised Maximum Price Regulation No. 169

Amendment No. 12
Dated May 26, 1943

* * * * * *

4. Section 1364.452(o) is amended to read as follows:

* * * * * *

(4) The fabricated beef cut prices applicable in Zone 3 and 4 for sales by a hotel supply house to purveyors of meals, subject to the provisions in paragraph (k) of Section 1364.452 for the purpose of this paragraph (o) the term "fabricated beef cut" for the term "wholesale cut" contained therein, are as follows:

all prices are on a dollars per hundredweight basis: The price for any fraction of a hundredweight shall be reduced accordingly. The prices set forth herein include costs of packaging]

Fabricated beef cuts	Grade			
	Choice or AA	Good or A	Com- mercial or B	Utility or C
Round, rump and shank off.....	\$33.50	\$31.50	\$27.50	\$23.50
Boneless rump (butt).....	27.50	25.25	23.00	21.00
Round and shank.....	12.50	12.50	12.50	12.50
Boneless round.....	37.00	34.25	30.25	25.50
Inside (top) round.....	41.50	37.75	33.00	27.50
Outside (bottom) round.....	41.50	37.75	33.00	27.50
Chuck (face).....	30.00	30.00	27.00	24.00
Boneless neck boneless round.....	36.25	33.00	29.50	25.25
Strip loin (bone in).....	58.25	52.50	44.00	35.00
Boneless strip.....	71.00	64.00	53.50	42.50
Trimmed full beef tenderloin.....	65.00	65.00	55.00	55.00
Trimmed sirloin tenderloin (butt tenderloin).....	65.00	65.00	55.00	55.00
Trimmed tip tenderloin (short tenderloin).....	65.00	65.00	55.00	55.00
Boneless sirloin (butt).....	38.50	35.00	29.50	24.00
Top sirloin (butt).....	49.00	46.00	40.00	32.00
Bottom sirloin (butt).....	31.00	27.25	22.00	18.50
Boneless chuck.....	28.25	27.50	25.75	23.00
Boneless chuck (shoulder clod out).....	27.50	26.75	25.25	22.50
Shoulder clod.....	31.00	31.00	28.00	25.00
Boneless briskets (deckle on).....	26.00	26.00	22.75	22.75
Boneless briskets (deckle off).....	32.75	32.75	28.00	28.00
Open prepared rib.....	35.50	33.25	29.75	25.50
Plate short ribs, plate short ribs.....	22.00	22.00	21.50	21.50
Plate, boned, rolled, and tied.....	43.75	41.25	37.25	32.50
Smoker roll.....	(1)	(1)	45.25	38.75
Regular roll (rib eye).....	(1)	(1)	69.50	58.75
Boneless short plate.....	22.00	22.00	21.50	21.50
Plate steak.....	25.00	25.00	25.00	25.00
Round steak (scored).....	28.75	28.75	28.75	28.75
Round steaks (bone in).....	59.25	55.25	46.00	40.00
Boneless strip steaks.....	73.25	66.00	55.00	43.75
Quarterhouse steaks (bone in).....	59.25	55.25	46.00	40.00
Round steaks (bone in).....	59.25	55.25	46.00	40.00
Boneless sirloin steaks.....	39.75	36.00	30.25	24.75
Top sirloin steaks.....	50.50	47.25	41.25	33.00

This grade not permitted to be sold and/or delivered.

Appendix M

Excerpt from Revised Maximum Price Regulation No. 169

Amendment No. 12

Dated May 26, 1943

* * * * *

4. Section 1364.452(o) is amended to read as follows:

* * * * *

(5) The fabricated beef cut prices applicable in Zones 3 and 4 for sales by packing or slaughtering plants, packing branch houses, wholesaler's or other selling establishment to purveyors of meals subject to the provisions in paragraph (k) of Section 1364.452, substituting for the purposes of this paragraph (o) the term "fabricated beef cut" for the term "whole-sale cut" contained therein, are as follows:

All prices are on a dollars per hundredweight basis: The price for any fraction of a hundredweight shall be reduced accordingly. The prices set forth herein include costs of packaging]

Fabricated beef cuts	Grade			
	Choice or AA	Good or A	Com- mercial or B	Utility or C
Round, rump and shank off.....	\$31.50	\$29.50	\$25.75	\$21.75
Boneless rump (butt).....	25.75	23.00	20.75	18.50
Round and shank.....	12.50	12.50	12.50	12.50
Boneless round.....	34.25	31.75	28.00	23.50
Side (top) round.....	38.25	34.75	30.50	25.25
Side (bottom) round.....	38.25	34.75	30.50	25.25
Chuck (face).....	28.50	28.50	25.50	23.00
Boneless neck boneless round.....	33.50	31.25	27.25	23.25
Strip loin (bone in).....	54.00	48.75	41.50	32.50
Boneless strip.....	65.75	59.25	50.25	39.50
Trimmed full beef tenderloin.....	60.00	60.00	50.00	50.00
Trimmed sirloin tenderloin (butt tenderloin).....	60.00	60.00	50.00	50.00
Trimmed tip tenderloin (short tenderloin).....	60.00	60.00	50.00	50.00
Boneless sirloin (butt).....	35.75	32.50	27.00	22.50
Top sirloin (butt).....	45.25	42.75	36.25	29.50
Bottom sirloin (butt).....	29.00	25.25	20.50	17.50
Boneless chuck.....	26.50	25.75	24.00	21.50
Boneless chuck (shoulder clod out).....	25.75	24.75	23.50	20.75
Shoulder clod.....	29.00	29.00	26.50	24.00
Boneless briskets (deckle on).....	24.25	24.25	21.00	21.00
Boneless briskets (deckle off).....	30.25	30.25	26.00	26.00
Open prepared rib.....	33.25	31.00	28.00	24.00
Plate short ribs, plate short ribs.....	19.75	19.75	19.25	19.25
Plate, boned, rolled, and tied.....	40.75	38.25	34.50	30.00
Smoker roll.....	(1)	(1)	41.50	35.50
Angular roll (rib eye).....	(1)	(1)	63.75	53.25
Boneless short plate.....	20.50	20.50	20.00	20.00
Beef steak.....	24.50	24.50	24.50	24.50
Round steak (scored).....	27.00	27.00	27.00	27.00
Round steaks (bone in).....	55.00	51.25	42.50	37.00
Boneless strip steaks.....	67.75	61.00	51.75	40.50
Quarterhouse steaks (bone in).....	55.00	51.25	42.50	37.00
Bone steaks (bone in).....	55.00	51.25	42.50	37.00
Boneless sirloin steaks.....	36.75	33.50	27.75	23.25
Top sirloin steaks.....	46.50	44.00	37.25	30.25

*This grade not permitted to be sold and/or delivered.

Appendix N

Excerpts from the Official Table of Trade Point Values for Meat, Fats, Fish, and Dairy Products

No. 4—Effective July 4, 1943.

* * * * *

Product	Points Per Lb.
MISCELLANEOUS BEEF PRODUCTS	
Suet, Cod, and Other Fats	3.0
MISCELLANEOUS VEAL PRODUCTS	
Suet and Other Fats	3.0
MISCELLANEOUS LAMB AND MUTTON PRODUCTS	
Suet and Other Fats	3.0

Appendix O

Price Interpretation No. 29

Issued by The Office of Price Administration

October 20, 1943

* * * * *

“Hotel Supply House” In order to retain its status, a hotel supply house must sell meat products only to purveyors of meals. If a hotel supply house sells a carcass, wholesale cut, fabricated cut, sausage, variety meats or edible by-products to a retailer it loses its status as a hotel supply house, as defined in Section 1364.455(b)(1). This interpretation applies also to Regulations No. 398 (Edible By-Products at Wholesale) 389 (Ceiling prices for certain sausage items at Wholesale) and 239 (Lamb and Mutton Carcasses and Cuts at Wholesale and Retail).

No. 11027

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**F. URI & Co., A COPARTNERSHIP; GEORGE URI AND MRS.
HOUSTON, COPARTNERS, DOING BUSINESS UNDER THE
NAME OF F. URI & Co., APPELLANTS**

v.

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLEE**

BRIEF FOR APPELLEE

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

FLEMING JAMES, Jr.,
Director, Litigation Division,

DAVID LONDON,
Chief, Appellate Branch,

ALBERT M. DREYER,
*Special Appellate Attorney,
Office of Price Administration, Washington, D. C.*

HERBERT H. BENT,
Acting Regional Litigation Attorney,

W. H. BRUNNER,
*District Enforcement Attorney,
San Francisco, Calif.*

FILED

PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11027

**F. URI & Co., A COPARTNERSHIP; GEORGE URI AND MRS.
HOUSTON, COPARTNERS, DOING BUSINESS UNDER THE
NAME OF F. URI & Co., APPELLANTS**

v.

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLEE**

BRIEF FOR APPELLEE

JURISDICTION

This appeal is taken from a judgment entered on January 8, 1945 (R. 25) by the United States District Court for the Northern District of California in favor of the Price Administrator under Section 205 (e) of the Emergency Price Control Act of 1942—56 Stat. 23, 50 U. S. Code App. Section 925 (e)—hereinafter referred to as the Act, as amended by Section 108 (b) of the Stabilization Extension Act of 1944 (58 Stat. 840). Notice of appeal was filed January 18, 1945 (R. 26). Jurisdiction of the district court was invoked under Section 205 (c) of the Act. Jurisdiction to hear and determine the appeal is conferred on this court by Section 128 of the Judicial Code (28 U. S. Code 225).

STATUTES AND REGULATIONS INVOLVED

The action involves two regulations issued under Section 2 (a) of the Act, namely, Revised Maximum Price Regulation 169 (7 F. R. 10381), as amended by Amendment 12, (8 F. R. 7109), which became effective on June 1, 1943, and Revised Maximum Price Regulation 239 (7 F. R. 10688), as amended by Amendment 7 (8 F. R. 10444), which became effective on July 29, 1943. The former regulation establishes maximum prices for beef and veal, and the latter, maximum prices for lamb and mutton. The pertinent provisions of each of the regulations, as well as the pertinent provisions of the Act, are set forth in the appendix to this brief.

Each of the regulations, as modified by the two amendments mentioned above, prescribes two schedules of maximum prices for "fabricated meat cuts" sold to hotels, restaurants, and other purveyors of meals.¹ The first schedule sets forth the maximum prices which may be charged by "hotel supply houses" and the second the prices which may be charged by other sellers, such as slaughterers and wholesalers. The prices which may be charged by hotel supply

¹ The term "fabricated cuts" is defined in each regulation as meaning various specifically described cuts of meats, all of which have always been sold chiefly to purveyors of meals. They differ from "wholesale cuts" which are sold by slaughterers, wholesalers, and other sellers to butchers, and also from the cuts usually sold by retail butchers to ultimate consumers. The meaning of the term "fabricated cuts" is not material to any of the issues of this case.

houses are higher than the prices which may be charged by others than hotel supply houses.²

Each regulation (Revised Maximum Price Regulation 169, as amended by Amendment 12, and Revised Maximum Price Regulation 239, as amended by Amendment 7) defines the term "hotel supply house" as follows:

"Hotel supply house" means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible byproducts to purveyors of meals; and which during the period September 15 through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 per cent of the total weight volume of meat, variety meats or edible byproducts sold by it.

The sole issue involved on this appeal is whether or not appellants are a hotel supply house within the meaning of the foregoing definition.

² The reasons for allowing hotel supply houses a premium price are explained at length in the Statement of Considerations, which the Administrator, in compliance with the requirements of Section 2 (a) of the Act, filed with the Division of the Federal Register upon issuing Amendment 12 to Revised Maximum Price Regulation 169. The pertinent parts of the Statement of Considerations above mentioned are printed as Appendix E to Appellants' brief (pp. vii to xii). The price differential established by the regulations was necessary in order to preserve the historical price relationship which had always prevailed in the industry prior to price control.

STATEMENT OF FACTS

Appellants are, and for many years have been, engaged in the business of fabricating and selling meat. They operate but one selling establishment. From September 15, 1942, through December 15, 1942, they sold more than 70% of the total weight volume of all meat, variety meats and edible byproducts sold by them to purveyors of meals. After the dates on which Amendment 12 to Revised Maximum Price Regulation 169 and Amendment 7 to Maximum Price Regulation 239 became effective,³ namely August 3, 1943, and February 1, 1944, they sold some meat to butchers or other persons who were not purveyors of meals, but the weight volume of all meats, variety meats, and edible byproducts which appellants sold to purveyors of meals has at all times been in excess of 70% the total weight volume of all meat, variety meats and edible byproducts sold by them. Appellants charged for fabricated cuts of beef, veal, lamb, and mutton which they sold to purveyors of meals prices equaling but not exceeding those which they would have been entitled to charge if they had been a hotel supply as defined by the regulations.

The trial court held that having sold meats to persons other than purveyors of meals after the effective dates of the amendments above mentioned, appellants were not a hotel supply house as defined by the respective regulations and had therefore violated the

³ Amendment 12 to Revised Maximum Price Regulation 169 was issued on May 26, 1943, and became effective on June 1, 1943. Amendment 7 to Maximum Price Regulation 239 was issued on July 24, 1943, and became effective on July 29, 1943.

regulations by charging purveyors of meals for fabricated cuts of beef, veal and lamb prices in excess of those prescribed by the respective regulations for sales of such products by persons other than hotel supply houses. The court denied, without prejudice to its renewal, the Administrator's application for an injunction on the ground that there was no reasonable ground to fear that appellants would violate the regulations in the future. It found that appellants' violations of the regulations were neither wilful nor the result of a failure to take practicable precautions against their occurrence. Accordingly it granted judgment in favor of the Administrator for an amount equal to, but not in excess of, the amount by which the prices charged by appellants exceeded the maximum prices prescribed by the regulations for sales by sellers other than hotel supply houses.

ARGUMENT

I. The court below correctly construed the regulations

In construing the definition of the term "hotel supply house" as including only those sellers who sell to purveyors of meals exclusively, the court below was clearly right. The construction which it adopted is compelled not only by the clear and unambiguous language of the regulation, but also by the reasons which underlay its adoption as well as by the construction which has been consistently placed upon it not only by the Administrator but also by the industry.

The definition set forth in the regulations lays down three conditions which must be met before any selling establishment can qualify as a hotel supply house.

First, *it must be a separate selling establishment not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment.* Secondly, it must be engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts to purveyors of meals. And thirdly, it must have sold to purveyors of meals during the period from September 15, 1942, through December 15, 1942, 70% of the total weight volume of meat, variety meats and edible byproducts sold by it. Significantly, the first two conditions are phrased in the present tense, whereas the third is phrased in the past tense. The first two conditions are therefore continuing conditions. If a selling establishment ceases at any time to meet either of the first two conditions, it ceases to be a hotel supply house.

When appellants sold meat to persons other than purveyors of meals they ceased to meet the first condition of the definition. Their establishment was no longer a separate establishment not physically connected with a wholesaler's or other selling establishment. This may be easily demonstrated. Assume that appellants operated two separate but physically connected establishments, from one of which they sold exclusively to purveyors of meals and from the other of which they sold exclusively to retailers. In such a case, it is obvious that the first condition of the definition would not be satisfied. It is even plainer that it would not be satisfied if sales to purveyors of meals and to retailers are made from the same place. The establishments in that case would be "physically attached" in that they would be physically identical.

In other words, if the first condition of the definition would not be satisfied when separate but physically connected establishments exist, a fortiori, it is not satisfied when the two operations are physically merged.

Any other construction would defeat the purpose and would run counter to the reasons which led to the adoption of the amendments defining the term hotel supply house. Those reasons were explained by the Administrator in an opinion denying protests filed by Patek-Ecklon Company challenging the validity of the definition as construed and interpreted by the Administrator. In the course of his opinion,⁴ the Administrator said:

For a full understanding of the issues raised in these protests it is necessary to review briefly the regulatory actions heretofore taken by the Administrator with regard to hotel supply houses.

In the Statement of Considerations accompanying Revised Maximum Price Regulation No. 169, issued on December 10, 1942, the Administrator stated his intention to establish specific and uniform ceilings for beef fabricated for use by hotels and other purveyors of meals. This intention was carried out in Amendment No. 12 to the Regulation and in similar Amendments to the other meat Regulations. These Amendments provide for a price premium for hotel supply houses, based on historical price relationships prevailing in the industry prior to

⁴ The opinion was issued on June 20, 1944. It is published in Vol. II, OPA Opinions & Decisions, at p. 261.

price control. It was found that sellers who were predominantly engaged in the hotel and restaurant trade were the principal suppliers of that trade, offered more specialized services and therefore usually obtained higher prices than packers or wholesalers; that the costs of such independent establishments were higher than those of packers and wholesalers who could spread their overhead over more diversified operations and whose methods of processing and fabrication were not adapted to the peculiar needs of hotels and restaurants.

The basis for these findings is set forth in detail in the Statement of Considerations involved in Amendment No. 12 to Revised Maximum Price Regulation No. 169. That statement also refers to the definition of "hotel supply house" set forth above and to the quota limitation upon the quantities of fabricated cuts which may be sold to purveyors of meals. The Administrator, while attempting to preserve the historical price premium enjoyed by the particular class of sellers known as "hotel supply house," was obviously faced with the necessity of preventing sellers from taking undue advantage of that premium and diverting supplies needed in a short market from the customary channels of distribution to the hotel and restaurant trade. Therefore a limitation of the amount of fabricated meat cuts which may be sold to purveyors of meals was established in the form of a quota determined by the amount of such sales made during a specified base period. Two sets of prices were established for the sale of fabricated cuts to purveyors of

meals. The higher prices applied to sellers which had historically specialized in that type of business and which were currently engaged exclusively in it. The lower prices applied to other sellers who engaged in the fabrication of beef cuts, and the sale of those cuts to purveyors of meals, in conjunction with some other type of wholesale meat business, such as slaughtering, or selling to wholesalers or retailers. It became necessary to establish criteria of eligibility for the premium price which would, as precisely and simply as possible, distinguish between those who were and those who were not within the scope of the justification for the higher price. Primarily, the distinction was between those establishments which carried on the fabrication of hotel supply cuts in conjunction with other meat business, and those which carried on only a hotel supply business. The definition making the distinction could not be drawn on the basis of sellers, since many slaughterers maintained entirely separate hotel supply establishments which engaged in no other aspect of the meat business. On the other hand, the definition could not be drawn in terms of separate departments, since a hotel supply department operated in immediate proximity to a slaughtering plant or wholesale warehouse would derive the same operating benefits as if there were no separation by "departments." The definition was drawn with reference to the basic fact which made the distinction necessary; namely, the dedication of facilities to the fabrication of cuts for purveyors of meals without having the use of the facilities in whole or in

part for other kinds of meat business. Accordingly, the "hotel supply house," eligible for the premium, was defined as "a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment," and "which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts to purveyors of meals." If sales are made to retailers at the same place at which sales are made to purveyors of meals, the establishments are "physically attached" in that they are physically identical. In other words, if the definition is not satisfied when separate but physically connected departments exist, *a fortiori* it is not satisfied when the two operations are physically merged.

Thus it is obvious that a hotel supply house, in order to remain eligible for the price premium, had to eliminate all sales to buyers other than purveyors of meals and to sell henceforth only to purveyors of meals. Otherwise such hotel supply house would no longer be a "separate selling establishment which is not physically attached to a * * * wholesaler's or other selling establishment," but would become a unit partly engaged in the wholesale trade.

This meaning of the definition was repeated in an official interpretation published by the Administrator on October 10, 1943, reading as follows:

In order to retain its status, a hotel supply house must sell meat products only to purveyors of meals. If a hotel supply house sells a carcass, wholesale cut, fabricated cut, sausage,

variety meats or edible by-products, to a retailer, it loses its status as a hotel supply house.

It was reiterated in the Statement of Considerations which the Administrator issued when he promulgated on January 28, 1944, Amendment 36 to Revised Maximum Price Regulation 169, which provides that under certain circumstances hotel supply houses may obtain permission to sell a limited quantity of meat products directly to consumers.⁵ The Statement reads in part as follows:

(2) Amendment No. 12 of Revised Maximum Price Regulation No. 169 defined a hotel supply house to exclude any selling establishment which, subsequent to the effective date of the amendment, engaged in sales of meats from the same selling establishment to others than purveyors of meals. The statement of considerations which accompanied the issuance of this amendment stated in detail the reasons which justified this narrow classification and need not be repeated here. However, soon after the provisions contained in the amendment became effective, comments were received from various field offices of the Office of Price Administration, indicating that the definition as set forth adversely affected those selling establishments which customarily serviced eating places, but, in addition, made sales to ultimate consumers from the same selling establishment and, in

⁵ This amendment itself may be considered in ascertaining the meaning of the definition just as subsequent legislation may always be considered in ascertaining the meaning of earlier legislation in *pari materia* *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 277; *Tiger v. Western Investment Co.*, 221 U. S. 286, 309.

certain areas, seriously interfered with normal distribution of meat either to purveyors of meals or to consumers. Accordingly, it was strongly recommended that any hotel supply house which could show that such consumer sales of the nature referred to were customarily indulged in, should be permitted to continue sales at retail in addition to their sales to purveyors of meals. Serious consideration was devoted to these recommendations. It was believed, on the one hand, that any disadvantage accruing to such establishment pricewise was counter-balanced by the adequate mark-up permitted hotel supply houses on sales of fabricated meat cuts to purveyors of meals, and accordingly was sufficient justification upon which to predicate the preclusion of such establishment from selling retail cuts to ultimate consumers, at retail margins. The Administrator also was of the opinion that the retail operation was not essential to provide a means to the hotel supply house of disposing of those meat cuts which were not customarily sold to hotels and restaurants, since even these cuts could be utilized by the hotel supply house in the manufacture of sausage and hamburger. Yet, notwithstanding these arguments to the contrary, which were designed to provide a groundwork for the action originally taken, the Administrator is of the opinion that a slight relaxation of the restriction provision is warranted to encourage sales to ultimate consumers and to permit normal operations in areas where such combination businesses were important elements in the distribution of meats. This action would be consistent with the principles and objectives

of Revised Maximum Price Regulation No. 169 as set forth in the statement of considerations accompanying the regulation, on file with the Division of the Federal Register. Accordingly, it is provided that a hotel supply house may make sales to ultimate consumers of retail meat cuts, variety meats and edible byproducts and processed meat products at prices not in excess of those established for class 3 and 4 stores in Maximum Price Regulations Nos. 355, "Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts and Variety Meats and Edible By-Products", 336 "Retail Ceiling Prices for Pork Cuts and Processed Meat Products", and 394, "Retail Ceiling Prices for Kosher Beef, Veal, Lamb and Mutton Cuts". Such sales may be made from the same selling establishment in conjunction with its sales of fabricated meat cuts to purveyors of meals, where an affidavit is filed with the Regional Office for the area, stating that such selling establishment regularly and generally engaged in making sales to ultimate consumers from September 15, 1942, through December 15, 1942, and where such selling establishment receives the necessary authorization in writing from the Regional Office. However, it is furthermore provided that in any case where sales by a hotel supply house to ultimate consumers during a three-month quota period exceed 20 percent of the total volume by weight of fabricated meat cuts, ground beef, and miscellaneous beef items and boneless and miscellaneous veal cuts sold and delivered during the same three month quota period to purveyors of meals, such selling establishment would be required thereafter to use

the lower mark-up (Section 1364.452 (o) (5) and Section 1364.467 (a) (5) as the case may be, on sales of fabricated beef cuts and/or fabricated veal cuts to purveyors of meals.

If the meaning of the definition were doubtful the administrative interpretation placed upon it would be controlling unless clearly erroneous. *Bowles v. Seminole Rock & Sand Co.*, 65 S. Ct. 1215. Here the administrative interpretation is obviously not clearly erroneous, for, as we have shown, both the plain meaning of the definition and the reasons which led to its adoption unite in compelling the construction which the Administrator has placed upon the definition. That construction, moreover, has been accepted by the industry in general. In his opinion denying the protest of *Patek-Ecklon Company* above mentioned the Administrator said:

It is important to emphasize that the industry in general has always been aware of the intention of the Administrator to limit the special hotel supply house mark-up to houses which, from the effective date of Amendment 12, sold exclusively to purveyors of meals. That the industry so understood the regulation is apparent from the fact that the Office of Price Administration, soon after Amendment No. 12 became effective, received comments from the field offices indicating that the definition adversely affected those selling establishments which customarily sold to hotels and restaurants but in addition also made some sales directly to ultimate consumers. After due investigation the Administrator determined that a slight relaxation of the

restriction was warranted in order to permit normal operations in areas where such combination businesses were important elements of meat distribution. Accordingly Amendment No. 36 to Revised Maximum Price Regulation No. 169 and Amendment No. 11 to Revised Maximum Price Regulation 239 were issued on January 28 and March 7, 1944, respectively. They provide that under certain conditions hotel supply houses may obtain permission to sell a limited quantity of meat products directly to consumers; at the same time the permissible quota for fabricated cuts was increased from 70% to 90% of base period sales.

From the foregoing we submit that it follows that the construction which the court below placed upon the definition was plainly right.

II. Section 2 (h) does not require that a different construction be placed upon the regulation

Appellants argue that if the definition is construed as the court below construed it then the regulations would be invalid under Section 2 (h) of the Act which prohibits the Administrator from using the powers granted him to compel changes in the business practices established in any industry except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation. But as this court has time and time again held, the only court which has jurisdiction to consider the validity of a regulation issued under the Act is the Emergency Court of Appeals.

Cf. *Rosensweig v. United States*, 144 F. 2d 30 (C. C. A. 9th, 1944)

We appreciate that Appellants disclaim any intention of challenging the validity of the regulation and claim merely to be invoking the firmly established canon of construction that a statute or regulation should, if possible, be construed to save it from invalidity. It may be conceded that inasmuch as the court below was required to interpret the regulations it had authority to make use of the general principles relating to the construction of documents. This would permit the court to consider as an aid to interpretation the reasonableness or absurdity, and the legality of alternative constructions. But those factors are only a few among many to be given weight; the ultimate criterion is the intention of the writer of the documents—in this case the Administrator. If the court were to proceed to determine what the Administrator meant in disregard of the language he employed and the Administrator's own interpretation, because of its views as to the lawfulness of the regulations under the statute, it would plainly be invading the jurisdiction of the Emergency Court of Appeals.

Thus in *Bowles v. Seminole Rock & Sand Company*, 145 F. 2d 482 the Circuit Court of Appeals for the Fifth Circuit placed a construction on a regulation different from that dictated by the plain language of the regulation and the interpretation placed upon it by the Administrator because it was of the opinion that if the construction thus dictated were adopted the regulation would be invalid. On certiorari (65 S. Ct.

1215), the Supreme Court held that the Circuit Court of Appeals erred in so doing, saying:

The problem in this case is to determine the highest price respondent charged for crushed stone during March 1942 within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

In short, the canon of construction upon which appellants rely can be used only as aid to ascertaining the intention of the author of the regulation. It cannot be resorted to for the purpose of placing upon a regulation a construction different from that dictated by the plain language of the regulation and the administrative interpretation placed upon it.

III. The Administrator has not specifically or by implication provided for sales by hotel supply houses to buyers other than purveyors of meals

Appellants' argument that the Administrator specifically provided for sales by hotel supply houses to buyers other than purveyors of meals is plainly without foundation. The Administrator made no provision for such sales. Appellants point to Sections 1364.407 (e) and 1364.454 (5) of Revised Maximum Price Regulation 169 as authorizing such sales. Section 1364.407 (e) (Appellant's appendix (g)) provides that "every separate selling establishment making sales to purveyors of meats * * * shall keep * * * a complete and accurate record showing separately the sales in pounds * * * to purveyors of means * * * and the sales in pounds made to other buyers." Since not only hotel supply houses but also packers and other sellers who are not prohibited from making sales to buyers other than purveyors of meals sell to purveyors of meals, it is obvious that the section cannot on any construction be said to contemplate sales by hotel supply houses to buyers other than purveyors of meals. Section 1364.454 (5) provides:

For local delivery made from the place of business of a wholesaler or *hotel supply house* * * * to the place of business of a *seller at retail*, purveyor of meals or *commercial user* * * * located more than 25 miles from such shipping point; the seller may add the cost of local delivery * * *.

Since the section applies not only to hotel supply houses but to wholesalers and other sellers as well, it

plainly does not expressly or by implication authorize sales by hotel supply houses to buyers who are not purveyors of meals.

Appellants also contend Section 1364.172 (b) of Maximum Price Regulation 239 (Appellants' Appendix I) indicates that sales by hotel supply houses to buyers who are not purveyors of meals were contemplated. The section enumerates several evasive practices which are prohibited by the regulation, including the selling or invoicing of lamb or mutton by hotel supply houses to persons other than purveyors of meals at prices allowed on sales to purveyors of meals. But the section expressly states that the enumeration is not exclusive. It does not, therefore, provide either expressly or impliedly that hotel supply houses may make sales to buyers who are not purveyors of meals.

IV. The other reasons urged by appellants for a reversal are without merit

The other reasons urged by Appellants for rejecting the trial court's construction of the regulations require but scant comment.

The various statements of the Administrator which Appellants assert indicate that the true construction of the regulations is different from that adopted by the court below support Appellants' contention only if they are torn from their context and then only obliquely. If they are read in their proper context and due regard is had for the time when, and the circumstances in which, they were made, it is plain that not one of them even remotely supports Appellant's contention.

As for Appellants' argument that it is impossible for a hotel supply house to restrict its sales to purveyors of meals (Appellants' Brief, p. 17) because bones, fats, and waste must be sold to tallow renderers and others it is sufficient to point out that Appellants lost their status as a hotel supply house not because of their sales of such products but because of the fact that they permitted their establishment to become a wholesale establishment by making sales to retailers of meat and other commodities the prices of which are regulated by the particular regulations. They would not have lost their status as a hotel supply house merely by making sales of bones, fats, etc., to buyers who are not purveyors of meals.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

FLEMING JAMES, Jr.,
Director, Litigation Division.

DAVID LONDON,
Chief, Appellate Branch.

ALBERT M. DREYER,
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HERBERT H. BENT,
Acting Regional Litigation Attorney.

W. H. BRUNNER,
District Enforcement Attorney,
San Francisco, Calif.

APPENDIX

APPLICABLE PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED BY SECTION 108 (b) OF THE STABILIZATION EXTENSION ACT OF 1944

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or

selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

APPLICABLE PROVISIONS OF REVISED MAXIMUM PRICE
REGULATION 169 AS AMENDED BY AMENDMENT 12

Section 1364.452.

(o) *Applicable zone prices for fabricated beef cuts sold to purveyors of meals.* (1) Subject to the pricing instructions contained in paragraph (a) of § 1364.451, the maximum price for each grade of each fabricated beef cut shall be the applicable zone price

determined in accordance with the provisions of paragraph (a) of § 1364.451, substituting for the purposes of this paragraph (o) the term “fabricated beef cut” whenever the words “wholesale cut” or “wholesale cuts” are used in said paragraph (a) of § 1364.451 plus the permitted additions, if any, specified in Schedule III (§ 1364.454), substituting for the purposes of this paragraph (o) the term “fabricated beef cut” whenever the words “wholesale cut” or “wholesale cuts” are used in Schedule III. No person shall sell or deliver any fabricated beef cut and no person shall buy or receive any fabricated beef cut unless such fabricated beef cuts is a fabricated beef cut as defined in § 1364.455 (b) (3) for which applicable prices have been established.

(2) The fabricated beef cut zone areas 1 to 10 are identical to the beef zone areas set forth in Schedule I (§ 1364.452).

(3) The applicable fabricated beef cut prices for zones 1 and 2 and 5 to 10 shall be the prices specified in subparagraphs (4) or (5) hereof (the applicable zone 3 and 4 price) plus the following:

Zone 1	\$1.75
Zone 2	1.00
Zone 5	.50
Zone 6	.75
Zone 7	1.00
Zone 8	1.25
Zone 9	1.50
Zone 10	1.75

(4) The fabricated beef cut prices applicable in Zone 3 and 4 for sales by a hotel supply house to purveyors of meals, subject to the provisions in paragraph (k) of § 1364.452, substituting for the purpose of this

paragraph (o) the term "fabricated beef cut" for the term "wholesale cut" contained therein, are as follows:

[All prices are on a dollars per hundredweight basis: The price for any fraction of a hundredweight shall be reduced accordingly. The prices set forth herein include costs of packaging]

Fabricated beef cuts	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
Round, rump and shank off.....	\$33.50	\$31.50	\$27.50	\$23.50
Boneless rump (butt).....	27.50	25.25	23.00	21.00
Hind shank.....	12.50	12.50	12.50	12.50
Boneless round.....	37.00	34.25	30.25	25.50
Inside (top) round.....	41.50	37.75	33.00	27.50
Outside (bottom) round.....	41.50	37.75	33.00	27.50
Knuckle (face).....	30.00	30.00	27.00	24.00
Gooseneck boneless round.....	36.25	33.00	29.50	25.25
Strip loin (bone in).....	58.25	52.50	44.00	35.00
Boneless strip.....	71.00	64.00	53.50	42.50
Trimmed full beef tenderloin.....	65.00	65.00	55.00	55.00
Trimmed sirloin tenderloin (butt tenderloin).....	65.00	65.00	55.00	55.00
Trimmed tip tenderloin (short tenderloin).....	65.00	65.00	55.00	55.00
Boneless sirloin (butt).....	38.50	35.00	29.50	24.00
Top sirloin (butt).....	49.00	46.00	40.00	32.00
Bottom sirloin (butt).....	31.00	27.25	22.00	18.50
Boneless chuck.....	28.25	27.50	25.75	23.00
Boneless chuck (shoulder clod out).....	27.50	26.75	25.25	22.50
Shoulder clod.....	31.00	31.00	28.00	25.00
Boneless briskets (deckle on).....	26.00	26.00	22.75	22.75
Boneless briskets (deckle off).....	32.75	32.75	28.00	28.00
Oven prepared rib.....	35.50	33.25	29.75	25.50
Rib, short ribs, plate, short ribs.....	22.00	22.00	21.50	21.50
Rib, boned, rolled, and tied.....	43.75	41.25	37.25	32.50
Spencer roll.....	(1)	(1)	45.25	38.75
Regular roll (rib eye).....	(1)	(1)	69.50	58.75
Boneless short plate.....	22.00	22.00	21.50	21.50
Cube steak.....	25.00	25.00	25.00	25.00
Flank steak (scored).....	28.75	28.75	28.75	28.75
Club steaks (bone in).....	59.25	55.25	46.00	40.00
Boneless strip steaks.....	73.25	66.00	55.00	43.75
Porterhouse steaks (bone in).....	59.25	55.25	46.00	40.00
T-bone steaks (bone in).....	59.25	55.25	46.00	40.00
Boneless sirloin steaks.....	39.75	36.00	30.25	24.75
Top sirloin steaks.....	50.50	47.25	41.25	33.00

¹ This grade not permitted to be sold and/or delivered.

(5) The fabricated beef cut prices applicable in Zones 3 and 4 for sales by packing or slaughtering plants, packing branch houses, wholesaler's or other selling establishments to purveyors of meals subject to the provisions in paragraph (k) of § 1364.452, sub-

stituting for the purposes of this paragraph (o) the term "fabricated beef cut" for the term "whole-sale cut" contained therein, are as follows:

[All prices are on a dollars per hundredweight basis: The price for any fraction of a hundredweight shall be reduced accordingly. The prices as set forth herein include cost of packaging]

Fabricated beef cuts	Grade			
	Choice or A A	Good or or A	Com-mercial or B	Utility or C
Round, rump and shank off.....	\$31.50	\$29.50	\$25.75	\$21.75
Boneless rump (butt).....	25.75	23.00	20.75	18.50
Hind shank.....	12.50	12.50	12.50	12.50
Boneless round.....	34.25	31.75	28.00	23.50
Inside (top) round.....	38.25	34.75	30.50	25.25
Outside (bottom) round.....	38.25	34.75	30.50	25.25
Knuckle (face).....	28.50	28.50	25.50	23.00
Gooseneck boneless round.....	33.50	31.25	27.25	23.25
Strip loin (bone in).....	54.00	48.75	41.50	32.50
Boneless strip.....	65.75	59.25	50.25	39.50
Trimmed full beef tenderloin.....	60.00	60.00	50.00	50.00
Trimmed sirloin tenderloin (butt tenderloin).....	60.00	60.00	50.00	50.00
Trimmed tip tenderloin (short tenderloin).....	60.00	60.00	50.00	50.00
Boneless sirloin (butt).....	35.75	32.50	27.00	22.50
Top sirloin (butt).....	45.25	42.75	36.25	29.50
Bottom sirloin (butt).....	29.00	25.25	20.50	17.50
Boneless chuck.....	26.50	25.75	24.00	21.50
Boneless chuck (shoulder clod out).....	25.75	24.75	23.50	20.75
Shoulder clod.....	29.00	29.00	26.50	24.00
Boneless briskets (deckle on).....	24.25	24.25	21.00	21.00
Boneless briskets (deckle off).....	30.25	30.25	26.00	26.00
Oven prepared rib.....	33.25	31.00	28.00	24.00
Rib short ribs, plate short ribs.....	19.75	19.75	19.25	19.25
Rib, boned, rolled, and tied.....	40.75	38.25	34.50	30.00
Spencer roll.....	(1)	(1)	41.50	35.50
Regular roll (rib eye).....	(1)	(1)	63.75	53.25
Boneless short plate.....	20.50	20.50	20.00	20.00
Cube steak.....	24.50	24.50	24.50	24.50
Flank steak (scored).....	27.00	27.00	27.00	27.00
Club steaks (bone in).....	55.00	51.25	42.50	37.00
Boneless strip steaks.....	67.75	61.00	51.75	40.50
Porterhouse steaks (bone in).....	55.00	51.25	42.50	37.00
T-bone steaks (bone in).....	55.00	51.25	42.50	37.00
Boneless sirloin steaks.....	36.75	33.50	27.75	23.25
Top sirloin steaks.....	46.50	44.00	37.25	30.25

¹ This grade not permitted to be sold and/or delivered.

Section 1364.455:

(b) When used in this Revised Maximum Price Regulation No. 169 and when applicable to sales of fabricated beef cuts to purveyors of meals the term:

(1) "Hotel supply house" means a separate selling establishment which is not physically attached to a

packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible byproducts to purveyors of meals; and which during the period September 15 through December 15, 1942 sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight volume of meat, variety meats, or edible byproducts sold by it.

(2) "Purveyor of meals" means:

(i) any restaurant, hotel, cafe, cafeteria or establishment which purchases meats and where meals, food portions or refreshments are served for a consideration.

(ii) The Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any agency of the United States.

(iii) Any person operating an ocean going vessel engaged in the transportation of cargo or passengers in foreign, coastwise or intercoastal trade, to the extent that meat is delivered to him as ship's stores for consumption aboard such vessel.

(iv) Any hospital, asylum, orphanage, prison or other similar institution, which is operated by any federal, state, or local government or agency thereof.

Section 1364.467:

(n) *Applicable zone prices for fabricated veal cuts sold to purveyors of meals.* (1) Subject to the pricing instructions contained in paragraph (a) of § 1364.466, the maximum price for each grade of each fabricated veal cut shall be the applicable zone price determined in accordance with the provisions of paragraph (a) of § 1364.466 substituting for the purposes

of this paragraph (n) the term “fabricated veal cut” whenever the words “wholesale cut” or “wholesale cuts” are used in said paragraph (a) of § 1364.466 plus the permitted additions, if any, specified in Schedule VI (§ 1364.469), substituting for the purposes of this paragraph (n) the term “fabricated veal cut” whenever the words “wholesale cut” or “wholesale cuts” are used in Schedule VI. No person shall sell or deliver any fabricated veal cut and no person shall buy or receive any fabricated veal cut unless such fabricated veal cut is a fabricated veal cut as defined in § 1364.470 (b) (3) for which applicable prices have been established.

(2) The fabricated veal cut zone areas 1 to 10 are identical to the beef zone areas set forth in Schedule I (§ 1364.452).

(3) The applicable fabricated veal cut prices for zones 1 to 3 and 5 to 10 shall be the prices specified in paragraphs (4) or (5) hereof (the applicable zone 4 price) plus the following:

Zone 1.....	\$2.50
Zone 2.....	1.50
Zone 3.....	.75
Zone 5.....	.50
Zone 6.....	.75
Zone 7.....	1.00
Zone 8.....	1.25
Zone 9.....	1.50
Zone 10.....	1.75

(4) The fabricated veal cut prices applicable in Zone 4 for sales by a hotel supply house to purveyors of meals subject to the provisions in paragraph (k) of § 1364.467, substituting for the purposes of this paragraph (n) the term “fabricated veal cut” for the

term "wholesale cut" contained therein, are as follows:

[All prices are on dollars per hundredweight basis; the price for any fraction of a hundredweight shall be reduced accordingly; all prices set forth herein include costs of packaging, except where otherwise specifically provided for]

Fabricated veal cuts	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
Veal loin, flank off, kidney and suet out.....	\$35. 00	\$32. 25	\$27. 00	\$23. 25
Veal loin steaks, T-Bone, Porterhouse, Club.....	36. 50	33. 50	28. 25	24. 25
Veal leg, boned, rolled and tied.....	39. 75	37. 50	33. 00	28. 50
Veal leg, oven prepared.....	36. 50	34. 25	30. 25	26. 25
Veal hotel rack, chine removed, blade bone cut.....	41. 00	41. 00	39. 00	35. 25
Veal rack or rib chops.....	39. 75	39. 75	37. 75	34. 00
Veal shoulder, boned, rolled and tied.....	32. 50	30. 75	27. 50	25. 75
Boneless veal, shank meat.....	26. 50	26. 50	26. 50	26. 50
Veal breast, reg. stew, bone in.....	16. 25	16. 25	16. 25	13. 50
Veal breast, with pocket.....	16. 25	16. 25	16. 25	13. 50
Boneless veal, shoulder, stew.....	32. 00	30. 25	27. 00	25. 25

(5) The fabricated veal cut prices applicable in Zone 4 for sales by packing or slaughtering plants, packing branch house, wholesaler's or other type of distributive establishment to purveyors of meals subject to the provisions in paragraph (k) of § 1364.467, substituting for the purposes of this paragraph (n) the term "fabricated veal cut," for the term "wholesale cut" contained therein, are as follows:

[All prices are on dollars per hundredweight basis; the price for any fraction of a hundredweight shall be reduced accordingly; all prices set forth herein include costs of packaging, except where otherwise specifically provided for]

Fabricated veal cuts	Grade			
	Choice or AA	Good or A	Commercial or B	Utility or C
Veal loin, flank off kidney and suet out.....	\$32.25	\$29.50	\$24.75	\$21.25
Veal loin steaks, T-Bone, Porterhouse, Club.....	33.00	30.25	25.25	21.75
Veal leg, boned, rolled & tied.....	37.00	34.75	30.75	26.50
Veal leg, oven prepared.....	34.00	31.75	28.00	24.25
Veal hotel rack, chine removed, blade bone out.....	38.50	38.50	36.75	33.00
Veal rack or rib chops.....	37.00	37.00	35.25	31.75
Veal shoulder, boned, rolled and tied.....	30.25	28.75	25.50	24.00
Boneless veal shank meat.....	24.75	24.75	24.75	24.75
Veal breast, reg. stew, bone in.....	15.25	15.25	15.25	12.50
Veal breast, with pocket.....	15.25	15.25	15.25	12.50
Boneless veal shoulder stew.....	29.75	28.25	25.00	23.50

Section 1364.470:

(b) When used in this Revised Maximum Price Regulation No. 169 and when applicable to sales of fabricated veal cuts to purveyors of meals, the term: (1) "Hotel supply house" means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible byproducts to purveyors of meals; and which during the period of September 15 through December 15, 1942 sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight

volume of meat, variety meats, or edible byproducts sold by it.

(2) Purveyor of meals means (i) any restaurant, hotel, cafe, cafeteria or establishment which purchases meats and where meals, food portions or refreshments are served for a consideration.

(ii) The Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any agency of the United States.

(iii) Any person operating an ocean going vessel engaged in the transportation of cargo or passengers in foreign, coastwise or intercoastal trade, to the extent that meat is delivered to him as ship's stores for consumption aboard such vessel.

(iv) Any hospital, asylum, orphanage, prison or other similar institution, which is operated by any federal, state or local government or agency thereof.

APPLICABLE PROVISIONS OF REVISED MAXIMUM PRICE
REGULATION 239 AS AMENDED BY AMENDMENT

Section 1364.160 (a):

(5) "*Hotel supply house*" means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts (fabricated meat cuts), variety meats, edible by-products and sausage to purveyors of meals; and which during the period September 15, 1942, through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, not less than 70 percent of the total weight volume of meat, variety meats, edible by-products or sausage sold by it.

(11) "Purveyor of meals" means:

(i) Any restaurant, hotel, cafe, cafeteria or establishment which purchases meats and where meals, food portions or refreshments are served for a consideration:

(ii) The War Shipping Administration of the United States;

(iii) Any person operating an ocean-going vessel engaged in the transportation of cargo or passengers in foreign, coastwise or intercoastal trade, to the extent that meat is delivered to him as ship's stores for consumption aboard such vessel;

(iv) Any hospital, asylum, orphanage, prison or other similar institution, which is operated by any federal, state, or local government agency thereof.

Section 1364.177 (c) (1):

(i) The Zone 2, 3 and 4 prices per hundredweight for hotel supply cuts sold by a hotel supply house to purveyors of meals are as follows:

Item	Lamb				Mutton	
	Grade AA	Grade A	Grade B	Grade C	Grade S	Grade H
Leg—oven prepared.....	\$39.00	\$37.75	\$35.50	\$32.75	\$22.00	\$20.50
Leg—boned; rolled and tied.....	42.50	40.75	38.50	35.50	23.75	22.25
Loin—flank on—kidney and suet out.....	38.75	34.25	27.75	22.75	16.50	14.25
Loin—flank off, kidney and suet out.....	43.50	38.25	30.25	23.75	17.00	14.75
Loin chops.....	46.00	40.00	31.75	25.25	17.75	15.25
Loin—boned, rolled and tied.....	50.50	44.25	35.25	28.25	21.50	18.25
Hotel rack—rib chops—regular.....	40.25	36.75	31.00	25.50	17.75	15.25
Hotel rack—rib chops, 8th to 12th ribs, inclusive.....	41.50	37.75	31.75	26.25	18.25	15.50
Hotel rack—rib chops, 5th to 7th ribs, inclusive.....	35.00	32.25	27.50	22.75	15.50	13.50
Hotel rack—chine removed, blade bone out.....	41.25	38.50	33.00	27.75	18.00	15.75
Yoke—boned, rolled and tied.....	(1)	(1)	(1)	(1)	11.25	9.75
Yoke—boneless stew.....	27.25	20.50	25.50	23.50	11.50	10.00
Shoulder—boned, rolled and tied.....	33.75	33.00	32.00	30.25	13.00	10.75
Shoulder—regular stew, bone in.....	26.50	25.75	24.75	23.00	10.25	9.00
Shoulder—boneless stew.....	34.25	33.00	31.75	29.50	13.00	10.75
Breast and shank—regular stew, bone in.....	12.25	12.25	12.25	11.00	7.00	7.00
Breast—regular stew, bone in.....	12.25	12.25	12.25	11.00	7.00	7.00
Shanks for braising or regular stew—bone in.....	13.25	13.25	13.25	12.00	7.50	7.50

Not permitted to be sold and/or delivered in this grade.

(ii) The Zone 2, 3 and 4 prices per hundredweight for hotel supply cuts sold by a packing or slaughtering plant, packing branch house, wholesaler or other selling establishment to purveyors of meals are as follows:

Item	Lamb				Mutton	
	Grade AA	Grade A	Grade B	Grade C	Grade S	Grade M
Leg—oven prepared.....	\$36.25	\$35.00	\$33.00	\$30.50	\$20.50	\$19.25
Leg—boned, rolled and tied.....	39.50	37.75	35.75	33.00	22.00	20.50
Loin-flank on, kidney and suet out.....	36.50	32.25	26.00	21.25	15.25	13.25
Loin-flank off, kidney and suet out.....	40.75	35.50	28.00	22.50	15.75	13.50
Loin chops.....	42.00	36.75	29.00	23.00	16.25	14.00
Loin—boned, rolled and tied.....	47.00	41.00	32.50	26.25	19.75	16.75
Hotel rack—rib chops—regular.....	27.25	34.00	28.75	23.50	16.25	14.00
Hotel rack—rib chops, 8th to 12th ribs, inclusive.....	38.00	34.75	29.25	24.00	16.75	14.25
Hotel rack—rib chops, 5th to 7th ribs, inclusive.....	33.25	30.75	26.25	21.75	14.75	12.75
Hotel rack—chine removed, blade bone out.....	38.50	35.75	30.75	25.75	16.75	14.75
Yoke—boned, rolled and tied.....	(1)	(1)	(1)	(1)	10.50	9.00
Yoke—boneless stew.....	25.25	24.50	23.75	21.75	10.50	9.00
Shoulder—boned, rolled and tied.....	31.50	30.50	29.75	28.00	12.00	9.75
Shoulder—regular stew, bone in.....	24.75	24.00	23.00	21.50	10.00	8.50
Shoulder—boneless stew.....	32.00	30.75	29.50	27.50	12.00	9.75
Breast and shank—regular stew, bone in.....	11.50	11.50	11.50	10.25	6.50	6.50
Breast—regular stew, bone in.....	11.50	11.50	11.50	10.25	6.50	6.50
Shanks for braising or regular stew, bone in.....	12.50	12.50	12.50	11.25	7.00	7.00

¹ Not permitted to be sold and/or delivered in this grade.

No. 11,027

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. URI & Co., INC. (a copartnership);
GEORGE URI and MRS. BELL HOUSTON,
copartners,

Appellants,

VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN,
CLERK

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Upon Appeal from the District Court of the United States for the
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APPELLANTS' REPLY BRIEF.

ARTICLE I.—APPELLEE, IN TECHNICALLY DISSECTING THE
FIRST TWO CLAUSES OF THE SENTENCE DEFINING THE
TERM "HOTEL SUPPLY HOUSE", IS FORCED TO GIVE
MORE THAN TWO DIFFERENT MEANINGS TO THE TERM
"SEPARATE SELLING ESTABLISHMENT".

Appellee, in his brief, rests his case upon a technical dissection of the language of the first two conditions set out in the definition as incorporated in Amendment 12; on a statement to the effect that the Administrator and the Industry have consistently interpreted Amendment 12 as requiring exclusive sales to purveyors of meals, and on an appeal to the find-

ings of the Administrator in his Opinion on the Protest in the *Patek-Ecklon* case and the Statement of Considerations supporting Amendment 36 to MPR-169.

In analyzing the definition of hotel supply house as it appears in Amendment 12, Appellee makes no attempt to analyze the meaning of the third clause in the definitive sentence. Appellee points out that the first two clauses, which require the existence of "a separate selling establishment physically unconnected, etc.", and the second clause which requires that the separate selling establishment engage in the fabrication and selling of meat cuts, are in the present tense, and therefore are continuing conditions. Appellee dismisses the third clause by merely reciting its terms and makes no attempt to show what part said third clause plays in painting the picture as a whole.

In attempting to illustrate the correctness of his analysis of the definition of a hotel supply house, Appellee on pages 6 and 7 of his brief writes:

"When appellants sold meat to persons other than purveyors of meals they ceased to meet the first condition of the definition. Their establishment was no longer a separate establishment not physically connected with a wholesaler's or other selling establishment. This may be easily demonstrated. Assume that appellants operated two separate but physically connected establishments, from one of which they sold exclusively to purveyors of meals and from the other of which they sold exclusively to retailers. In such a case, it is obvious that the first condition of the definition would not be satisfied. It is even plainer that it

would not be satisfied if sales to purveyors of meals and to retailers are made from the same place. The establishments in that case would be 'physically attached' in that they would be physically identical. In other words, if the first condition of the definition would not be satisfied when separate but physically connected establishments exist, a fortiori, it is not satisfied when the two operations are physically merged."

When Appellee, in the fourth sentence of the above-quoted paragraph, uses the words "assume that appellants operated two separate but physically connected establishment", it is necessary to ask what Appellee means by "operated"? If he means to assume that Appellants operated two separate but physically connected establishments during the base period, then manifestly Appellants could not have qualified as a hotel supply house in the first place. They would not have been operating "a separate selling establishment physically unconnected" with any other type of seller. They would have been operating two separate but physically connected establishments to each of which they could have looked for contributions as to overhead and as to profit.

If Appellee means to assume a situation in which Appellants "operated" two such separate but physically connected establishments after the promulgation of Amendment 12, then Appellee correctly asserts that loss of hotel supply house status would result.

Appellee's difficulty is that in order to sustain his point, he has to give two different meanings to the

term "separate selling establishment", which appears only once in the definition. He has to give the term one meaning when applied to the base period and another meaning to the term as applied to the period subsequent to the issuance of Amendment 12. He can not use the same reasoning in both instances. If such reasoning is so applied, then manifestly the single establishment which sold 70 per cent to purveyors of meals and 30 per cent to other buyers during the base period was never a separate selling establishment, but two separate selling establishments physically connected in that they were identical—in which case no such establishment could ever have qualified as a hotel supply house. Yet, the Administrator stated in his Statement of Considerations (Amendment 12) as quoted on page 12 of Appellants' Opening Brief:

"To qualify as a hotel supply house a packing or slaughtering plant, packer's branch house or wholesaler's, or other type of establishment *must have maintained a separate selling unit not physically attached to the slaughtering plant, branch house, or wholesaler's, or other establishment through which at least 70 per cent of the total weight volume of meat distributed in the base period was sold or delivered to purveyors of meals.*" (Italics added.)

The Appellee can not logically maintain that the term "separate selling establishment" as contained in the definition means one thing as applied to the base period and another thing as applied to the period subsequent to the issuance of the Amendment. That term can only have one meaning—it cannot have two

meanings. If the action of Appellants in selling more than 70 per cent of their meats to purveyors of meals and less than 30 per cent to retailers, or others, during the period covered by this litigation means that their single establishment has become two establishments physically connected with each other in that they are identical; then the single selling establishment which Appellants maintained during the base period and from which they sold meats in the same proportions to more than one class of customers was never a single establishment, but was always two or more establishments physically connected because they were physically identical and they could not have qualified.

In stipulating that Appellants qualified as a hotel supply house, Appellee necessarily stipulated that during the base period, when they were selling 70 per cent of their meats to purveyors of meals and 30 per cent to other buyers, Appellants' single selling establishment was a "separate selling establishment". They can not now successfully argue that the term "separate selling establishment", which appears only once in the definition, meant one thing during the base period and another during the period covered by this litigation.

The fallacy of the reasoning employed by Appellee in his analysis of the Amendment 12 definition may again be illustrated by referring to the revised definition of hotel supply house, under Amendment 36, to which Appellee makes reference on pages 11-13 of his brief. This revised definition again defines a hotel supply house as a "separate selling establish-

ment", but provides that it can sell not only to purveyors of meals but also to ultimate consumers.

By introducing the Statement of Considerations supporting Amendment 36, Appellee again switches the meaning which he applies to the term "separate selling establishment" so that it is necessary for him to redefine that term for a third time. Appellee's varying contentions in this regard may be noted to be as follows:

First, that during the base period a separate selling establishment could be maintained while 70 per cent sales were being made to purveyors of meals and 30 per cent to others. Second, that after the base period an establishment could not remain separate if it made sales to others than purveyors of meals because performance of two functions would convert a single establishment into two establishments physically connected because physically identical. Third, under Amendment 36, a separate selling establishment can remain separate and is not two establishments physically connected, in that they are physically identical, where a single selling establishment sells not only to purveyors of meals but to ultimate consumers.

In his Memorandum Decision on Pre-Trial, the Lower Court stated that:

"Designating a 'hotel supply house' in the regulation as a 'separate selling establishment' would seem to have no other reasonable purpose than that of exclusion of any other selling activity."

The definition in Amendment 36 is a complete answer to this finding. Amendment 36 again designates

a hotel supply house as “a separate selling establishment” and not only fails to provide for the “exclusion of any other selling activity”, but, on the contrary, specifically provides for other selling activity by allowing “separate selling establishments” to sell to purveyors of meals, and to ultimate consumers.

ARTICLE II.—THE STATEMENT OF CONSIDERATIONS SUPPORTING AMENDMENT 36 AND THE OPINION OF THE ADMINISTRATOR IN THE PATEK-ECKLON CASE ARE BELATED SELF-SERVING DECLARATIONS HAVING NO BEARING UPON APPELLEE’S INTENTIONS WHEN HE ISSUED AMENDMENT 12.

The implication made by such passing references as are made to the Statement of Considerations (Amendment 12), in Appellee’s brief, in his Statement of Considerations supporting Amendment 36, and in his Opinion in the *Patek-Ecklon* case, are, it is true, apparently designed to lead one to believe that the considerations set forth in those three documents are incorporated in the Statement of Considerations supporting Amendment 12.

Such is not the case.

There is nothing in the Statement of Considerations supporting Amendment 12 to indicate that the Administrator intended to authorize collection of the hotel supply house premium by “sellers which had historically specialized in that business and *which were currently engaged exclusively in it*”. (Appellee’s Brief, page 9.) The italicized phrase is entirely new.

There is nothing in the Statement of Considerations supporting Amendment 12 which would have lead anyone to believe that, as set forth on page 12 of Appellee's brief:

"The Administrator also was of the opinion that the retail operation was not essential to provide a means to the hotel supply house of disposing of those meat cuts which were not customarily sold to hotels and restaurants, since even these cuts could be utilized by the hotel supply house in the manufacture of sausage and hamburger."

All of the above, and many more of the matters set forth in both the Statement of Considerations to Amendment 36, and in the Opinion dismissing the Patek-Ecklon protest (a protest to which Appellants were a party, and which was filed after Appellants had been threatened with suit), are obviously afterthoughts which had not occurred to the Administrator when he promulgated Amendment 12, and which were designed to justify OPA Price Interpretation No. 29.

If, as asserted by the Administrator in the Patek-Ecklon Opinion, many slaughterers maintain separate hotel supply establishments which engage in no other aspect of the meat business, it is reasonable to suppose that the premium would have been restricted to such establishments, and that the base-period qualification would have been 100 per cent sales to purveyors of meals and not 70 per cent of such sales. That assertion is contained in the Patek-Ecklon Opinion, an Opinion which is not part of the Record, and

it is a statement of alleged fact which Appellants have had no opportunity to disprove.

Appellants assert as a result of a lifetime in the hotel supply house business that no such establishments exist, or ever have existed, if by being "engaged in no other aspect of the meat business", the Administrator means that such establishments always sold every pound of their meats to purveyors of meals. Purveyors of meals have never taken every cut that is in a carcass, and no hotel supply house ever existed which did not find it necessary, usually at a loss, to dispose of surplus meats to retailers, ultimate consumers, renderers and other hotel supply houses.

The assertion made by the Administrator in the Statement of Considerations supporting Amendment 36 to the effect that he was of the opinion (ostensibly at the time Amendment 12 was issued), that sales to retailers were not necessary to dispose of the surplus cuts which were not customarily sold to hotels and restaurants were unnecessary, because such cuts could be used by the hotel supply house in the manufacture of sausage and hamburger, is another instance of "ex post facto" thinking.

In ordinary times, the cuts which usually were not sold to hotels and restaurants vary with the seasons, and under the conditions which prevailed in the period covered by this litigation they varied not only with the seasons but with the changing ration point values.

Assuming that the Administrator was familiar with his own regulations (as to both price and rationing),

it is difficult to understand how on January 28, 1944 he could have believed that eight months earlier he had forbidden sales to retailers by hotel supply houses because they could sell their surplus cuts to restaurants in the form of sausage and hamburger.

The OPA Official Table of Trade Point Values for Meat, Fish, Fats, and Dairy Products, as in effect during the period covered by this litigation, defined hamburger as:

“Beef ground from necks, flanks, shanks, skirts, heel of round, briskets, plates, and miscellaneous beef trimmings and beef fat.”

That table prescribed 7 points per pound valuation for hamburger, and higher point values for the majority of the primal cuts.

It does not appear from the record that the cuts from which hamburger may be made are those cuts for which there was no sale to the hotels and restaurants. Appellee does not reveal how he could have looked back on January 28, 1944 to the time when Amendment 12 was issued and remembered that he had then expected the hotel supply house to use cuts other than those mentioned in the above-quoted definition to illegally process hamburger; or how 8 months earlier he could have expected a hotel supply house to illegally use higher point meats to make low point hamburger. Nor is it easy to imagine how at that time he could have remembered that 8 months earlier he had expected a hotel supply house to sell to purveyors of meals 21¢ hamburger which might have had to be processed from higher priced meats.

Appellants reading the Statement of Considerations on May 26, 1943 could have looked in vain for any word that the Administrator had ruled out sales to retailers because surplus primal cuts could be sold as hamburger to hotels and restaurants.

One more point which Appellee makes on page 14 of his brief, where he again quotes from the Opinion in the *Patek-Ecklon* case, is that the Administrator and Industry have always been aware of the intention of the Administrator to limit the special hotel supply house markup to houses which from the effective date of Amendment 12 sold exclusively to purveyors of meals. That that statement is inaccurate, can be proven by the Record.

Obviously that portion of the Industry which is concentrated in San Francisco was not always aware of the intention of the Administrator to so limit the application of the premium. On the contrary, 100 per cent of the San Francisco hotel supply houses were of contrary awareness, and every one of them was sued by the Administrator the year after the Amendment was issued.

As of August 6, 1943, the Industry in general had not accepted the interpretation which the Administrator had not yet issued. The hotel supply house industry had not only been selling variety meats to retailers, but had been charging a \$2.00 per hundred-weight premium. The Administrator, therefore, found it necessary to issue Amendment No. 1 to MPR-398, and in his Statement of Considerations (Appellants' Opening Brief, Apx. "K"), the Administrator stated,

not that the Industry should discontinue selling to retailers, but that it should not continue to charge retailers the \$2.00 premium. It is apparent that on August 6, 1943, the Administrator also was not aware that he had intended originally to restrict hotel supply houses to sales to purveyors of meals.

It is also certain that as late as October the Industry was so unaware of that intention of the Administrator that he had to tell Industry about it by issuing OPA Price Interpretation No. 29—an interpretation which is couched more in the language of an Order than it is couched in interpretive language.

In a portion of the Opinion in the *Patek-Ecklon* case not quoted by Appellee, the Respondents are charged with notice of the contents of OPA Price Interpretation No. 29 as of January, 1944, when it was broadcast to the trade through the medium of bulletins put out by the American Meat Institute and the National Association of Hotel and Restaurant Meat Purveyors. Had the Industry been so aware from the beginning, it is hardly reasonable to suppose that these two associations would have waited from May 26, 1943 to January, 1944 to so advise their membership.

ARTICLE III.—APPELLANTS ENTIRELY AGREE THAT THE LANGUAGE OF THE AMENDMENT ITSELF, AND THE STATEMENT OF CONSIDERATIONS SUPPORTING THE AMENDMENT, CAN BE USED ONLY TO DETERMINE THE MEANING OF THE REGULATION AND THE INTENTIONS OF THE ADMINISTRATOR.

In Part II of his argument, Appellee deals at some length with the rules of legal construction. With neither the arguments therein expressed nor the conclusions therein arrived at do Appellants take issue. Appellants entirely agree that the language of the Amendment itself and of the Statement of Considerations supporting it can be used only to determine the meaning of the regulation and the intentions of the Administrator at the time he issued the regulation.

Appellants have quoted the Statement of Considerations (Amendment 12) at length. Appellee, strangely, does not quote a single statement from that Statement of Considerations which explained the need for and the meaning of the definition herein at issue.

ARTICLE IV.—APPELLANTS AGAIN SUBMIT THAT THE ADMINISTRATOR NOT ONLY CONTEMPLATED SALES BY HOTEL SUPPLY HOUSES TO OTHERS THAN PURVEYORS OF MEALS, BUT THAT CERTAIN PROVISIONS OF HIS REGULATIONS SPECIFICALLY AND BY IMPLICATION AUTHORIZE SUCH OTHER SALES.

In part III of Appellee's brief, page 18, Appellee quotes from Section 1364.407(c) as follows:

“every separate selling establishment making sales to purveyors of meals * * * shall keep * * * a complete and accurate record showing separately the sales in pounds * * * to purveyors

of meals * * * and the sales in pounds made to other buyers.”

Appellants again emphasize that the above language as it appears in Amendment 12 requires that every hotel supply house keep a record of its sales, not only to purveyors of meals, but a record of his sales to other buyers.

Appellee's answer is that since not only hotel supply houses, but packers and other sellers, who are not prohibited from making sales to purveyors of meals, do make sales to purveyors of meals, that the above language has no such significance as Appellants place upon it.

It is submitted that whether or not others than hotel supply houses do make sales to purveyors of meals has absolutely nothing to do with the point at issue. Section 1364.407(e), above partially quoted, applies only to “separate selling establishments”. The term “separate selling establishment” is applied by the regulations only to hotel supply houses. Such records as such other sellers have to keep are provided for in other sections of the regulation. There would be no need for the Administrator to require that “separate selling establishments” keep records of their sales “to other buyers” if such sales were not authorized.

In urging the point that the Administrator specifically provided for sales by hotel supply houses to buyers other than purveyors of meals, Appellants quoted from Section 1364.454(5), which is requoted by Appellee on page 18 of his brief. The quotation reads as follows:

“For local delivery made from the place of business of a wholesaler or *hotel supply house* * * * to the place of business of a *seller at retail*, purveyor of meals or *commercial user* * * * located more than 25 miles from such shipping point; the seller may add the cost of local delivery * * *.”

It is respectfully submitted that if the English language means anything at all, the above-quoted section means that whenever a hotel supply house, or a wholesaler, makes a delivery to either a retailer or a commercial user located more than 25 miles from his shipping establishment, he may add to the zone prices the cost of local delivery.

Appellee's answer is to the effect that since this section applies not only to hotel supply houses but to wholesalers, it plainly does not authorize such sales by hotel supply houses.

Appellee says, in effect, that because additional costs for distant deliveries can be made by both hotel supply houses and wholesalers, that therefore they can not be made by hotel supply houses. According to Appellee, this provision, inasmuch as it applies to two types of sellers, does not apply to one of them.

Appellee's only comment on Section 1364.172(b) of MPR-239 is that, inasmuch as that section enumerates only one prohibited evasive practice it does not therefore provide either expressively or by implication for sales to other buyers. The section involved reads as follows:

“Section 1364.172(b). Specifically, but not exclusively, the following practices are prohibited:

* * * * *

(5) Selling or invoicing lamb or mutton by hotel supply houses to persons other than purveyors of meals at the prices allowed on sales to purveyors of meals.”

It is true that such section does not expressly provide for sales to other buyers. It is respectfully submitted, however, that it definitely does so by implication. There would be no need to warn the hotel supply house not to charge other buyers the permitted hotel supply house prices if the hotel supply house could not make such sales to other buyers.

Appellee makes no comment upon that portion of the Statement of Considerations for Amendment 1 to MPR-398 (Ap. “K”, Appellants’ Opening Brief), wherein on August 6, 1943, the Administrator stated that it was not his intention that retailers be charged the \$2.00 per hundredweight premium on variety meats, but did not state that retailers could not be sold at prices which excluded that premium.

ARTICLE V.—APPELLANTS RESPECTFULLY SUBMIT THAT THE VARIOUS STATEMENTS OF THE ADMINISTRATOR, WHICH WERE QUOTED IN APPELLANTS’ OPENING BRIEF, CORRECTLY REFLECTED THE ADMINISTRATOR’S INTENTIONS.

In Part IV of Appellee’s brief, page 19, Appellee attempts to waive aside, without answering, the various reasons urged by Appellants in their opening brief.

Appellee alleges that the various statements of the Administrator which Appellants urged as supporting

their construction of the regulation, do so only if they are torn from their context, and then obliquely. Inasmuch as practically all of the reasons urged by Appellants in their opening brief were adopted almost word for word from the Administrator's Statement of Considerations (Amendment 12), it is difficult to follow Appellee's reasoning.

If there is one extraordinary thing in this whole case, it is that Appellee, when he issued Amendment 12, concurrently issued a 5-page Statement of Considerations explaining what he meant and why he meant it, and that during this whole controversy he has never quoted a single word or sentence from that Statement, either torn from its text or otherwise.

It is much easier for a disputant to say that a portion of a statement has been torn from its text than it is for him to put that portion back into the text and show wherein the whole document supports his own conclusions. If the full text does support Appellee's position, one would expect to find him quoting his own explanation as written at the time he wrote the Amendment. Instead, Appellee relies on explanations made eight and thirteen months later to explain the explanation he made originally.

ARTICLE VI.—THE SALE OF FATS, BONES AND SCRAPS TO TALLOW RENDERERS IS NO LESS A SALE TO OTHER BUYERS THAN IS THE SALE OF SURPLUS CUTS TO RETAILERS.

Appellee concludes his argument by pointing out that Appellants did not lose their status because they

sold bones, fats and waste to tallow renderers and others. Appellee follows this statement with the assertion that Appellants would not have lost their status as a hotel supply house merely by making sales of fats, bones and scraps to buyers who are not purveyors of meals.

The basis for these statements is impossible to determine. In OPA Price Interpretation No. 29, the Administrator stated that "in order to maintain its status a hotel supply house must sell meat products *only to purveyors of meals.*" (Italics added.)

In his Memorandum Decision on Pre-Trial Order the District Court stated that:

"Designating a 'hotel supply house' in the regulation as a 'separate selling establishment' would seem to have no other reasonable purpose than that of exclusion of any other selling activity."

Fats, bones and scraps are meat products. They are under price ceilings. Under the heretofore quoted section of Section 1364.407(e) of MPR-169, which is a meat regulation, records had to be kept of the sales of such items just as they had to be kept of other cuts of meat. As pointed out by Appellants (Apx. "N", Appellants Opening Brief), meat ration points had to be collected for them.

Certainly the sale of such items to renderers and others constitutes a selling activity within the meaning of the sentence above quoted. If the Opinion of the Lower Court means what it rationally appears to mean, Appellants were engaged in some other selling activity when they sold such items to tallow renderers.

The sale to P. Micheletti and Co. on August 3, 1943 (which company was neither a tallow renderer nor a retailer, but a hotel supply house) happened to be the first sale of meat products to a non-purveyor of meals, which was made after August 1, 1943. It might just as well have happened that the first sale of meat products to a non-purveyor of meals might have been made on August 3rd to a tallow renderer instead of to P. Micheletti and Co. Had such been the case, it is submitted that under the wording of his Memorandum Decision on Pre-Trial, the Lower Court would necessarily have had to find that Appellants had lost their status as a hotel supply house.

Just as in the case of the term "separate selling establishment which is not physically attached, etc.", the Appellee apparently has two or more meanings for the phrase "exclusive selling activity" and "other selling activity." A hotel supply house must sell "exclusively" to purveyors of meals. He is engaged in "another selling activity" if he sells not only to purveyors of meals but to retailers; but he is not engaging in "another selling activity" if he sells to purveyors of meals and tallow renderers. Again the Administrator's position is that a hotel supply house may sell only to purveyors of meals; but is apparently not engaged in "another selling activity" if it sells to tallow renderers and ultimate consumers.

ARTICLE VII.—THE DECLARED PURPOSE OF AMENDMENT 12 WAS TO DIVERT MEAT TO RETAIL BUTCHER SHOPS. IT IS, THEREFORE, INCONSISTENT TO INTERPRET THAT AMENDMENT AS PLACING A PENALTY ON SALES TO RETAIL BUTCHERS.

It would appear from a reading of Appellee's brief that the only "other selling activity" which is forbidden is the selling of meats to retailers.

Such an interpretation is especially incongruous in view of the fact that the Amendment was originally issued to correct certain abuses which had resulted from a previous regulation—the effect of which had been to force practically all meats into hotels and restaurants, and to leave the retailers' shelves bare.

The Administrator stated, when he issued Amendment 12, that "by making prices for such cuts less attractive to the latter class of sellers than they have been recently, the new ceilings are expected to work hand in hand with the 70 per cent quota restriction in diverting meats to retail stores."

The declared purpose of these provisions was to divert meat from hotels and restaurants to the retail stores where the public could buy same for home consumption. The Administrator stated emphatically that he wanted to safeguard normal channels of distribution, which meant that the hotels and restaurants should continue to receive a reduced quantity of fabricated cuts from the same sources of supply they had historically utilized, and that the retail butcher would continue to secure his share of available meats from the same sources which had historically supplied him. Normally, the purveyors of meals had secured the

major portion of their fabricated cuts from hotel supply houses and a minor part from wholesalers and packers. Normally, the retail butcher had received the larger portion of his meats from packers and wholesalers, and a smaller portion from the hotel supply houses.

It is respectfully submitted that where a regulation designed to put meat into the retail butcher shops is so interpreted as to prohibit the hotel supply house from disposing of its surplus meats to retail butchers under penalty of losing its status, that interpretation certainly does violence to the declared purposes of the regulation itself.

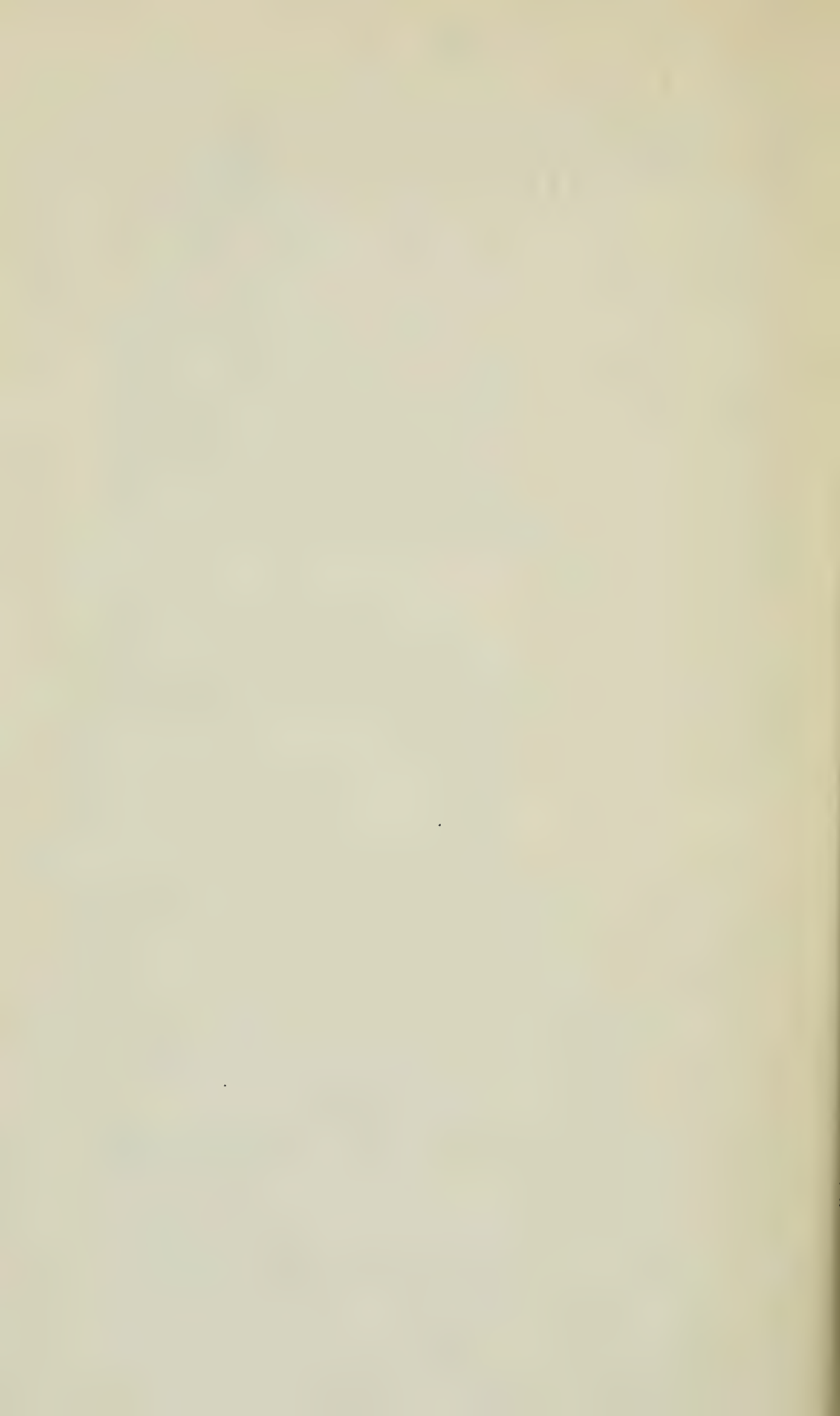
Particularly is this so when that interpretation was issued long after the 60-day period during which Appellants could have lodged a legally supportable protest against the regulation.

CONCLUSION.

It is respectfully submitted that the judgment of the Lower Court should be reversed.

Dated, San Francisco, California,
August 8, 1945.

Respectfully submitted,
EDMOND F. MAHER,
Attorney for Appellants.



No. 11,027

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

F. URI & Co. (a copartnership), GEORGE URI
and MRS. HOUSTON, copartners, doing busi-
ness under the name of F. Uri & Co.,
Appellants,
VS.

CHESTER BOWLES, Administrator, Office of
Price Administration,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

Appellee, Chester Bowles, as Price Administrator of the Office of Price Administration, respectfully petitions this Court pursuant to Rule 25 for a rehearing and reconsideration of its judgment entered herein on December 18, 1945.

The sole issue involved in this case is whether or not one who sells meat cuts, fabricated meat cuts and

edible by-products not only to purveyors of meals but to others as well is a hotel supply house within the following definition:

“ ‘Hotel supply house’ means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer’s branch house, wholesaler’s or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible by-products to purveyors of meals; and which during the period September 15 through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight volume of meat, variety meats or edible by-products sold by it.”

By its decision this Court held that so long as a person otherwise satisfying the requirements of the definition sells at least 70 percent of the total weight volume of meat, variety meats or edible by-products sold by it to purveyors of meals, it is a hotel supply house within the meaning of the foregoing definition. It is respectfully submitted that it was error for this Court so to hold for the following reasons:

1. Three conditions must be met before any selling establishment can qualify as a wholesale supply house. First, it must be a separate selling establishment not physically attached to a packing house, slaughtering plant, packer’s branch house, wholesaler’s or other selling establishment; secondly, it must be engaged in the fabrication of meat cuts and the sale of fabricated meat cuts to the purveyor of meals; and thirdly, it

must have sold to purveyors of meals during the period from September 15, 1942 through December 15, 1942, 70 percent of the total weight volume meat, variety meats and edible by-products sold by it. The first two conditions are phrased in the present tense, whereas the third is in the past tense. The first two conditions refer to the present and future; the third solely to the past. In holding that a selling establishment otherwise satisfying the requirements of the definition would not lose its status as a hotel supply house if it sells less than 30 percent of the total weight volume of the meat, variety meats and edible by-products to persons other than purveyors of meals, the Court in effect interpolated a qualification into the first and second conditions and recast the definition so as to read as follows:

“ ‘Hotel supply house’ means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer’s branch house, wholesaler’s or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of *70 percent of the total weight volume of* fabricated meat cuts, variety meats and edible by-products sold by it; and which during the period September 15 through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight volume of meat, variety meats or edible by-products sold by it.”

It is respectfully submitted that the current conditions of the definition should not be qualified in this manner. The 70 percent requirement relates solely to

the period from September 15, 1942 through December 15, 1942. It cannot be carried over into the present.

Unless the qualification is added to the current conditions of the definition, then under the holding of this Court a hotel supply house would be free to sell any amount to purveyors and any amount to retailers. This is the only result that can be reached once the definition is interpreted as to permit sales to retailers as well as to sales to purveyors of meals. A hotel supply house, therefore, would under this Court's interpretation of the definition be at liberty to sell 99 percent to retailers and 1 percent to purveyors of meals. This produces a result that was clearly not intended by the regulation. If a hotel supply house were permitted to sell in this manner there would be no justification for the premium price permitted them by the regulation. The allowance of a premium price to hotel supply houses was made because of the high costs incurred by an establishment dedicated to the business of selling to purveyors of meals, and there would be no justification for granting the premium price if the bulk of a selling establishment's sales were made to retailers. Since the 70 percent requirement can not logically be made a part of the current requirements of the definition, the interpretation urged by the Administrator that a hotel supply house must sell exclusively to purveyors of meals, produces the only reasonable result and the only one consistent with the obvious intent of the regulation.

2. Contrary to this Court's assumption, the Administrator has never taken a position at variance to that which he urges here. This Court lays stress on the provision of Section 1364.172(b) of Revised Maximum Price Regulation 239, which prohibits hotel supply houses from selling to persons other than purveyors of meals at the prices allowed on sales to purchasers of meals. This provision was contained in the regulation when it was first issued and when the present definition of the term "hotel supply house" did not exist. Under the original definition of that term there was no limitation on the class of purchasers to whom hotel supply houses could sell. Accordingly the prohibition contained in Section 1364.172(b) against the sale to persons other than purveyors of meals at prices allowed on sales to purveyors of meals was incorporated. It has no bearing on the meaning of the present definition and lends no support to the conclusion that hotel supply houses may still sell to persons other than purveyors of meals.

The excerpt from the statement of considerations which, agreeable to the provisions of Section 2(a) of the Emergency Price Control Act the Administrator issued when he promulgated amendments to the regulations incorporating the present definition of hotel supply house, is nothing more than a rephrasing of the definition itself. It in no way interprets or amplifies the definition of a hotel supply house as contained in the regulation. It simply recites in almost verbatim language the basic provisions of the definition in the

regulation. No different meaning can be drawn from the statement of considerations which cannot be drawn from the language of the definition itself. Both the definition in the regulation and the statement of considerations use the past tense "sold" with reference to the 70 percent requirements.

Nor does the excerpt from the opinion of the Administrator which he rendered in denying the protest of *Oswald & Hess Co.* support the conclusion that a hotel supply house may sell to others than purveyors of meals. That opinion dealt solely with the 70 percent requirement, which, as said before, relates solely to the period from September 15 to December 15, 1942 and not with the current requirements of the regulation. Moreover, it was issued on July 6, 1944, approximately 10 months after the issuance of the official interpretation to the effect that one who sells to others than purveyors of meals is not a hotel supply house, and approximately one month after the Administrator rendered his opinion in *Patek-Ecklon* to the same effect.

There is nothing in Section 1364.407(e) providing for the keeping of records or in Section 1364.454(5) relating to local delivery charges which in any way supports the conclusion that a hotel supply house, within the meaning of the regulation, may sell to others than purveyors of meals. Both of those sections pertain not only to hotel supply houses but to wholesalers as well. In drafting the regulation the Administrator had the alternative of putting in separate para-

graphs the record keeping and local delivery provisions for each type of seller, or lumping all sales together in a single paragraph. For purposes of simplification and brevity, he elected to use the alternative of lumping all sales together. It would be unreasonable to draw from this choice of techniques of draftsmanship an inference that it was intended that hotel supply houses should be permitted to sell to others than purveyors of meals.

3. Nor may any inference from the policy underlying the adoption of amendment 12 to Maximum Price Regulation 169, to which this Court refers, which will support the conclusion that the Administrator intended to permit hotel supply houses to sell to retailers. The prices which the regulations permit to be charged on sales to purveyors of meals lead to the diversion of sales from retail stores. The limitation of the definition of hotel supply houses was designed to limit the number of sellers who could sell at the premium price established by the regulation for sales by hotel supply houses. This limitation was designed primarily to prevent packers and slaughterers who would normally sell to retailers from diverting their business from this class of purchasers to purveyors of meals. The lower prices for sales by slaughterers was considered as some deterrent to their engaging extensively in sales to purveyors of meals. The major method which the Administrator adopted, however, to prevent diversion of normal business from retailers was the quota limitations imposed by amend-

ment 12. The quota limitations had nothing at all to do with the definition of hotel supply houses or to price levels for sales to purveyors of meals. The quota limitations on all sellers to purveyors of meals were designed to prevent packers and slaughterers who control the source of supply from selling unlimited quantities to purveyors of meals. Their sales to purveyors of meals being limited, packers and slaughterers would necessarily have to sell the balance of their meat to other classes of the trade, such as retailers. It should be emphasized that the basic policy of preventing undue diversion of meat to purveyors of meals was designed to compel slaughterers and packers to sell to retailers rather than diverting all of their supplies to purveyors of meals. The limitation of persons who could be hotel supply houses and the quota provisions of the regulation were directed primarily at placing limitations on slaughterers who control the source of supply.

4. In holding that an administrative interpretation of a regulation is not entitled to weight unless issued concurrently with the regulation, this Court appears to have misconceived the holding of the Supreme Court in *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410. In the *Seminole* case many of the interpretations which the Supreme Court relied upon were issued long after the regulation had been promulgated. As a matter of fact there is seldom occasion to issue an interpretation until after a regulation has been issued and outstanding for a period of time. They are issued

ordinarily only upon request by persons in doubt as to the meaning of the regulation. Consequently it rarely happens that such interpretations are issued concurrently with the promulgation of the regulation. Therefore to limit the rule laid down by the Supreme Court that such an interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets, to interpretations which are issued simultaneously or concurrently with the regulation, is virtually to deny the existence of the rule. Moreover, the Supreme Court has held that an administrative interpretation announced for the first time at the commencement of a lawsuit is entitled to weight. (*Skidmore v. Swift & Co.*, 323 U. S. 134.) That case dealt with the interpretation of the statute. Certainly if an administrative interpretation of a statute is entitled to weight, even though announced for the first time during the course of a lawsuit, an interpretation issued by an administrative body of its own regulation should be entitled to greater weight. The Administrator, of course, concedes that he is without power to amend a regulation in the guise of interpreting it, but no such situation is involved here, for the interpretation is wholly consistent with the plain language of the regulation.

CONCLUSION.

For the foregoing reasons, this petition for a rehearing should be granted.

Dated, February 6, 1946.

Respectfully submitted,

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

MILTON KLEIN,

Director, Litigation Division,

DAVID LONDON,

Chief, Appellate Branch,

ALBERT M. DREYER,

Special Appellate Attorney,

HERBERT H. BENT,

Regional Litigation Attorney,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

I, Albert M. Dreyer, hereby certify that I am one of the counsel for the Administrator in the above-entitled action; that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated, February 6, 1946.

ALBERT M. DREYER,
*Of Counsel for Appellee
and Petitioner.*

Due service and receipt of a copy of the within is hereby admitted

this.....day of February, 1946.

Attorneys for Appellants.

